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ABSTRACT

This document is a collection of 16 lessons designed for use in United States history and American government courses at the high school level. The lessons are divided into four distinct categories: (1) religion and the Establishment Clause; (2) freedom of expression; (3) due process and other rights of the accused; and (4) equal protection of the laws. Individually each lesson is based upon an actual cases decided by the United States Supreme Court. The lessons are intended to introduce students to basic constitutional principles, especially the need to protect individual liberties in an ordered society. Reenactments of key Supreme Court cases are an effective way to introduce students to constitutional issues. The lessons in this manual are based intentionally on controversies that originated in U.S. classrooms or the juvenile court system. Students tend to have a natural curiosity about cases that focus on young people confronting issues that might be similar to the ones they are currently facing, or interacting in a school environment that is analogous to their own. The use of authentic cases also can help to illustrate that it is possible for ordinary citizens, including students, to initiate actions that ultimately reach the Supreme Court where important precedents that affect millions of people are established. This manual includes suggested teaching approaches, two bibliographies, and a listing of national law-related education resource centers and state coordinators for law-related education. Appendices include the U.S. Constitution, three ERIC digests, and information on the American Bar Association's law-related education resource center. (DK)

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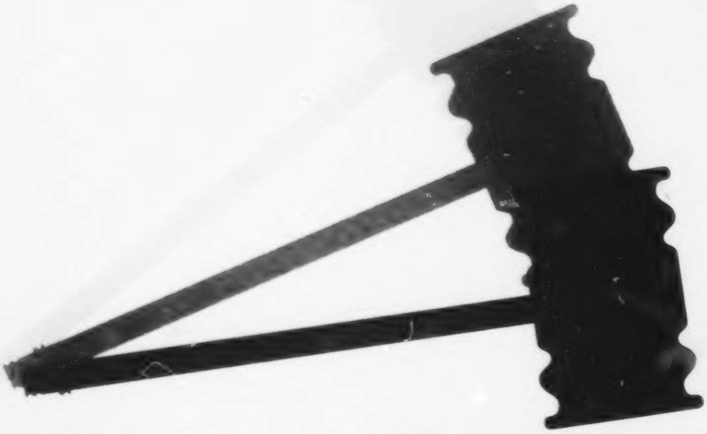
CONSTITUTIONAL RIGHTS OF JUVENILES AND STUDENTS: LESSONS ON SIXTEEN SUPREME COURT CASES

Gerald P. Long



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Social Studies Development Center
ERIC Clearinghouse for Social Studies/
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1994

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ABOUT THE AUTHOR

Gerald P. Long has taught history and government at Brown County High School, Nashville, Indiana for fourteen years. In the last five, he has served as Social Studies Department Chair.

Mr. Long received his bachelor of arts degree in Political Science from the State University of New York at Buffalo in 1974. He earned his Masters degree in Social Studies Education at Indiana University in 1985.

Mr. Long has been actively involved with the We the People... program for the past five years. During those years, his class has won the 9th Congressional District competition every year, and has won individual units of the Indiana state competition in that program twice.

Mr. Long currently serves on the ERIC Clearinghouse for Social Studies/Social Science Education National Advisory Board and has served on the Education Committee of the Indiana Civil Liberties Union.

His article, "Understanding Religious Freedom Through Court Simulation" was published in the *OAH Magazine of History*, vol. 5, no. 1, 1990.

FOREWORD

More than two hundred years ago (June 8, 1789), James Madison made a remarkable speech in the House of Representatives about the addition of a Bill of Rights to the Constitution. He predicted,

> *[I]ndependent tribunals of justice [headed by the Supreme Court of the United States] will consider themselves in a peculiar manner the guardians of those [constitutional] rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution.*

And so it has been during the later part of the twentieth century, when the Supreme Court finally fulfilled the destiny Madison foresaw. It has become the ultimate guarantor of individual rights against abuses by government officials or oppressive majorities within or outside the halls of government.

There is no better way to teach students about their constitutional rights than by exposing them to the substantive work of the "guardians of those rights" — the Supreme Court of the United States—as it is recorded in the Court's decisions about late twentieth-century cases on constitutional rights. Through careful examination and analysis of these landmark cases on rights, students will learn how liberty can be secured through law. And, they will develop commitments, based on reflection and reasons, to the values that buttress liberty under law. Finally, they will sharpen their capacities for thought as they grapple intellectually with complex constitutional issues and profound arguments on alternative sides of these legal controversies.

Gerald Long, a creative and effective high school teacher of government, has provided, in this volume, sixteen case studies on critical constitutional issues about individual rights, which can be used to strengthen teaching and learning of civics and government. Mr. Long methodically developed the lessons on these sixteen cases, which appear in this volume, through several years of work with his students at Brown County High School, Nashville, Indiana. Thus, one can have confidence that these lessons can be used effectively in the classroom. Further, the lessons are nicely written and the subject matter is intrinsically interesting to students, as it involves real events and issues in the lives of adolescents. Mr. Long has made a valuable contribution to the legal case study literature for high school teachers and students.

John J. Patrick, Director,
ERIC Clearinghouse for Social Studies/
Social Science Education, and
Director, Social Studies Development
Center, Indiana University

I
PROLOGUE FOR TEACHERS

Introduction to the Lessons

This collection of lessons is designed for use in United States history and American government courses at the high school level. The sixteen lessons are divided into four distinct categories: Religion and the Establishment Clause, Freedom of Expression, Due Process and Other Rights of the Accused, and Equal Protection of the Laws. Individually each lesson is based upon an actual case decided by the United States Supreme Court. Collectively, the lessons are intended to introduce students to basic constitutional principles, especially the need to protect individual liberties in an ordered society.

The Constitution and the Bill of Rights have allowed this delicate balance between liberty and order to endure for over two hundred years. It is important for students to understand that the balance has been maintained because both the power of government and the rights of the individual are subject to reasonable limits. For example, the First Amendment makes what appears to be an absolute command that there shall be "no law" abridging the freedom of speech. However, to quote Justice Oliver Wendell Holmes, not even the "most stringent protection of free speech would protect a man in falsely shouting fire in a theater and causing a panic." Recently, however, the Supreme Court decided that it was equally unreasonable for the government to exceed its authority by punishing an individual for actually setting his American flag on fire as an act of political protest.

It is also important for students to recognize that while the Constitution does provide a number of explicit directions for the operation of government, as is illustrated by the requirement that a citizen must be at least thirty-five years old to be elected president, it would be a mistake to view the document as a detailed blueprint with a definitive answer for each and every controversy. For example, when is a law "necessary and proper"? When is a search "unreasonable"? The true genius of the framers of the Constitution and the Bill of Rights was their ability to create a set of documents that were specific enough to provide functional directions for the establishment and on-going operation of a complex governmental system, yet pliable enough to allow future generations to apply basic constitutional principles to conflicts that were unforeseen and, probably, unimaginable when the documents were written.

To complicate matters even more, it is not unusual for two equally valid provisions of the Constitution to be at odds. The Tenth Amendment states that powers not delegated to the national government are "reserved to the States" and, as a result, individual states have established separate school systems. On the other hand, the Fourteenth Amendment prohibits states from infringing upon individual liberties. Can a state-sponsored school system limit a student's speech under the Tenth Amendment, or would this be a violation of the Fourteenth Amendment? Is it proper for the federal judiciary to regulate a state's operation of its public schools?

The job of interpreting the phrases of the Constitution, and resolving conflicts between two or more provisions of the document, has been delegated to the judicial branch of the federal government. Consequently, reenactments of key Supreme Court cases can be an effective way to introduce students to constitutional issues. In addition to presenting important issues, the sixteen lessons in this manual are intentionally based upon controversies that originated in American classrooms or the juvenile court system. Students tend to have a natural curiosity about cases that focus on young people confronting issues that might be similar to the ones they are currently facing, or interacting in a school environment that is analogous to their own.

The use of authentic cases can also help to illustrate that it is possible for ordinary citizens, including students, to initiate actions that ultimately reach the Supreme Court where important precedents are established. These precedents can affect millions of people.

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A particular litigant, or the circumstances surrounding a specific case, might appear to be quite extraordinary, but at the center of virtually every dispute that reaches the nation's highest court stands an otherwise ordinary individual. This is an often overlooked aspect of participatory government.

This set of lessons will encourage students to engage in a process of lively debate and, as a result, they will begin to appreciate that the Constitution and the Bill of Rights are as relevant today as they were more than two hundred years ago. The Framers declared that one of the purposes of the Constitution was to "secure the Blessings of Liberty to ourselves and our Posterity." Experience in the classroom has taught me that high school students are fully capable of interpreting the basic tenets of the Constitution. Intuition has convinced me if future generations of American students are to savor and support the blessings of liberty, teachers must accept the responsibility to provide a forum for these students to discuss the application of constitutional principles to contemporary issues.

Procedures for Teaching the Lessons

Each of the sixteen lessons will take approximately three class periods. The lesson procedures are as follows:

Day One

Introduce each lesson to the class by discussing the background information and the pertinent facts of the case. Clarify the constitutional issue presented by the case and the precedents that influenced the decision ultimately reached by the Supreme Court. At this time do not reveal that decision to the class.

Appoint three students to act as legal counsel for the appellant, and three students to represent the respondent. The case citation lists the appellant first, and the respondent second. For example, in *Wisconsin v. Yoder* (1972), the state of Wisconsin was the appellant and Jonas Yoder was the respondent.

Appoint five students to serve as Supreme Court justices. The students who act as justices, as well as the students providing legal counsel for the two sides, can either be volunteers or they can be selected by the instructor. Students who were not appointed to fill one of these roles should be reminded that other constitutional issues will be addressed in this manner and, eventually, everyone will be directly involved.

The three groups of students who have been assigned active roles for this particular case should be separated into small groups. The side representing the appellant and the side representing the respondent should both prepare a brief outline of the argument they will present to the justices. The justices should use this time to prepare questions for both sides that will help them reach a decision. The instructor should visit briefly with each of the three groups to help the students focus on the issue to be resolved and to answer any questions raised by the students.

Conclude the opening class period by explaining the manner in which the case will be argued and decided during the next class period.

Day Two

Arrange the class so that the two teams of lawyers are facing each other, with the justices in the front of the classroom. While the students acting as lawyers and justices organize their collective thoughts, briefly review the facts of the case and the pertinent constitutional issue with the rest of the class.

Allow both the appellant and the respondent up to five minutes to present their opening oral arguments to the justices. The appellant goes first and the respondent follows. After the opening statements, allow both sides up to five minutes to offer a rebuttal. The justices should then direct any questions that they have to the two sides. These questions should help clarify the positions taken in the case so that the justices will be able to reach a decision.

Remind the justices that their decision must be based upon constitutional principles. Have these five students step outside the classroom for a few minutes to briefly discuss the case and to reach a decision. Remind them that the vote does not have to be unanimous, and that each of the justices will have the opportunity to justify his or her opinion.

Once the justices have reached a decision it should be rendered to the class, with the aforementioned explanations from each of the justices. Allow the other members of the class to express either agreement or disagreement with the decision. Inform the class that the actual Supreme Court decision will be discussed during the next class period.

Day Three

Review the majority and dissenting positions that were advanced by the panel of student justices. Then ask the class to speculate on how the case may have been decided by the Supreme Court.

Explain the actual decision that was reached in this case. It will be helpful to share the quotes from the majority and dissenting opinions by the Supreme Court justices with the class. Ask the class for its initial reaction to the decision, and focus the students' attention upon the reasoning behind the ruling handed down by the Court.

Conclude the lesson by reviewing the follow-up discussion questions that have been provided. Of course, other relevant questions are likely to be raised by this discussion. Try to emphasize that there is not a "perfect" solution for each and every constitutional issue, because the Constitution itself is a document that is open to interpretation.

An Alternative Teaching Approach

Some teachers may prefer to use these 16 lessons strictly as exercises in case analysis and classroom discussion of Supreme Court decisions. This teaching procedure involves assignment of the first two parts of a particular case, as presented in this collection of 16 cases: the issue and the background facts. Then the teacher could conduct a full classroom discussion about the issue of the case. At the end of the discussion, the teacher could conduct a classroom vote to determine how the majority of the class would decide the issue of the case.

Or the teacher could divide the class into five or seven subgroups. Each group would have the task of analyzing, discussing, and deciding the issue of the case. Then, ask a representative of each group to report the group's decision and the reasons for the decision.

The final facet of this lesson procedure is to assign the third section of each lesson: the Court's decision. Ask students to compare their decisions on the issue of the case, and their reasons in supporting their decisions with the decisions and reasons of the Court. The teacher and students should also examine and respond to the dissenting opinions on each case.

II

RELIGION AND THE ESTABLISHMENT CLAUSE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

—*First Amendment to the Constitution of the United States of America*

Lessons on Supreme Court Cases:

Lesson 1 - *Wisconsin v. Yoder* (1972)
Lesson 2 - *Wallace v. Jaffree* (1985)
Lesson 3 - *Edwards v. Aguillard* (1987)
Lesson 4 - *Board of Education of the Westside Community School v. Mergens* (1990)

LESSON ONE

Case: *Wisconsin v. Yoder*, 1972 (406 U.S. 205; 92 S.Ct. 1526).

Issue: Does a compulsory school attendance law violate the First Amendment's free exercise of religion clause when it is applied to Amish children? Conversely, would granting the Amish an exemption from the statute violate the First Amendment's establishment of religion clause by creating a preference for the sect?

Objectives: At the conclusion of the lesson students should be able to:

1. distinguish religious beliefs from religious practices;
2. comprehend the difference between the free exercise of religion clause and the establishment of religion clause;
3. cite examples of reasonable limits placed upon religious practices by the government;
4. recognize the existence of religious subcultures in the United States;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 1: BACKGROUND AND FACTS

The First Amendment to the U.S. Constitution contains two provisions on the subject of religion. The amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Originally, the reference to Congress limited the scope of this amendment to actions by the federal government. In more recent years, however, both of the religion clauses have been applied to the various states by a process known as selective incorporation. The essence of the incorporation doctrine is that the liberty component of the Fourteenth Amendment's due process clause protects most of the guarantees found in the Bill of Rights against unreasonable violations by state governments. (See Amendments I and XIV in the copy of the U.S. Constitution that appears in the Appendix.)

The United States Supreme Court applied the free exercise clause to the states in 1940 in *Cantwell v. Connecticut* and, in 1947, the establishment clause was incorporated in a similar manner in *Everson v. Board of Education of Ewing Township*.

Returning to the actual words of the First Amendment, what is meant by an "establishment of religion"? In the *Everson* case the Supreme Court declared that both the national government and state governments are prohibited from establishing an official religion and, in addition, laws that aid all religions or that prefer one religion over others are also prohibited.

Concerning the "free exercise" clause, it is important to distinguish religious beliefs from religious practices. Beliefs, because they can be held privately, are inherently beyond the scope of governmental interference. However, actions that might be motivated by religious beliefs are subject to a reasonable amount of supervision whenever those practices pose a realistic threat to the general welfare. For example, most people would agree that the government can legitimately ban any religious ceremony that includes a human sacrifice.

When is governmental interference with religious practices reasonable and when is it unreasonable? In 1879, in *Reynolds v. United States*, the Supreme Court declared that the government can indeed restrict religious conduct when it held that Congress had the authority to outlaw polygamy in territorial Utah. At the time the practice was advocated by the Mormons as a requirement for salvation. However, the Court viewed marriage as a civil contract and it reasoned that Congress was merely providing for the general welfare of society by preventing polygamy from being practiced. Therefore, in the eyes of the Court, the legislative branch was not establishing or endorsing monogamy as a religious tenet.

In *Sherbert v. Verner* (1963), the Court took a more flexible approach when it recognized that when there are "special circumstances" religious conduct can be ruled exempt from controls that are applied to the general population. In such instances, the state must demonstrate a "compelling public interest" for the application of the regulation to the religious minority or an exemption is granted.

In 1972, *Wisconsin v. Yoder* presented the Supreme Court with yet another conflict between the free exercise clause and the establishment clause. Jonas Yoder was a member of an Amish farm community in Green County, Wisconsin. As a religious subculture, the Amish number over fifty-thousand followers nationally. They reside in the rural areas of about twenty states.

The Amish have become relatively well-known for their self-imposed isolation from society and for their resistance to cultural and technological changes. For example, most Amish individuals do not use telephones, automobiles, modern farm machinery, electrical appliances, televisions, or radios. As a religious group, they have been present in North America for approximately three hundred years. Contemporary Amish live and dress very much as their ancestors did in the eighteenth century.

Amish customs and laws are based upon their strict interpretation of the Bible. They contend that salvation requires living apart from worldly influences by maintaining agrarian, church-centered communities. As a result, the Amish insulate themselves from the modern world out of fear that extended contact with the dominant culture that surrounds them would eventually lead to the disintegration of their own unique culture.

Concerning education, Amish communities generally maintain their own elementary schools. The Amish feel that their children will benefit from mastering basic math and language skills. These skills are considered necessary to function as good farmers and citizens, to read the Bible, and to interact with non-Amish people when called upon to do so. According to Amish convictions, however, education beyond the eighth grade is not only superfluous, it is detrimental since too much knowledge of modern culture can only alienate a person from God.

Jonas Yoder and the other Amish parents in Wisconsin faced a moral dilemma when the state attempted to enforce its school attendance law. The statute required all children to attend school until at least the age of sixteen. This would have required the Amish children, like students in most states, to attend high school for a minimum of two years. Generally, the Amish are politically apathetic, but they are also known to be a very law-abiding group of people. Non-compliance with a law is usually a last resort, and this was the case when the Amish confronted the compulsory education law. It is only adherence to a more precious religious tenet that will motivate the Amish to challenge the authority of the state.

After refusing to send their children to secondary school, Yoder and other Amish parents were convicted for violating Wisconsin's school attendance law. When the case eventually reached the Supreme Court, the lines of contention were clearly drawn. The Amish claimed that the law in question was a violation of the free exercise of religion clause guaranteed in the First Amendment and applied to the states via the Fourteenth Amendment. To support this claim the Amish offered testimony that enforcement of the law posed a realistic threat to the very survival of the religion since the values stressed in high school, especially competitiveness, are diametrically opposed to the concept of communal cooperation which is the cornerstone of the agrarian lifestyle practiced by the Amish. The Amish also presented expert testimony that warned of the psychological conflict Amish children would suffer as a result of continual exposure to the cultural influences that dominate the high school environment. Amish parents also feared that high school attendance would present an obstacle to the integration of Amish youth into an agrarian community that de-emphasized material success for religious reasons. To compensate for not attending secondary school, the Amish did include an informal, but rigorous program of vocational training within the framework of this integration process.

The state of Wisconsin defended its enforcement of the law by arguing that a high school education is designed to prepare children to become self-sufficient members of the community. High school, according to the state, also helps prepare students to participate in the political process and popular participation is essential for the survival of a republic. It was also the state's position that children who might eventually choose to leave the Amish community as adults would be at a severe disadvantage in society-at-large due to their relative lack of education.

The state of Wisconsin presented the legal argument that any exemption from the law would allow parents to act in a manner contrary to the best interests of the children. Under these circumstances the primary purpose of the statute was to encourage education and not to denigrate religious beliefs or to violate religious freedom. Constitutionally, an exemption could be portrayed as an example of preferential treatment and thereby a violation of the equally important establishment clause.

LESSON 1: DECISION

The Supreme Court ruled that Wisconsin's compulsory school attendance law, when applied to Jonas Yoder and the other Amish parents, was an unconstitutional violation of the free exercise of religion clause that is contained in the First Amendment. The vote was 6-1, and Chief Justice Warren Burger wrote the opinion for the majority, with Justice Douglas in dissent. Justices Powell and Rehnquist did not participate in the decision.

The Chief Justice stressed that the Court's ruling was not intended to undermine the general applicability of the statute. The importance of education justifies the enactment of reasonable regulations by the state, but Burger called for a "balancing process" whenever state guidelines place fundamental rights in jeopardy.

To maintain a balance between liberty and order, the rights of the individual and the legimate authority of the state, the Court stipulated that a state must demonstrate an interest of "sufficient magnitude" to justify any statutory interference with religious liberty. Wisconsin presented a number of arguments in favor of applying the statute universally, without exception. First, the appellant reasoned that education is necessary to prepare individuals to be self-reliant and self-sufficient members of society. However, the Court accepted the Amish system of "learning by doing" vocational training as an acceptable alternative to formal high school instruction, especially for the agrarian community maintained by the Amish.

The state also argued that any child who eventually left the Amish community would be ill-equipped for life in a technological society. Burger's response was as follows:

> *There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance would become burdens on society because of educational shortcomings.*

The second major argument advanced by the State of Wisconsin was that a basic education is needed to participate effectively and intelligently in our open political system. The fact that the Amish had survived and prospered in North America for three centuries impressed Burger as "strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship." Additionally, the Amish reputation for being a law-abiding society was not challenged.

Burger summarily dismissed the state's concern that the adolescents were being exploited. He related that the employment of children under parental guidance on family farms is an "ancient tradition" located on the periphery of child labor laws. There was no suggestion that the farm labor was deleterious to the health of the Amish children.

Concerning the establishment clause, the Court specified that granting the Amish an exemption from the statute did not constitute an establishment of religion since this exemption did not favor or support the Amish over other religious groups. Essentially, the Court maintained that it was simply reviewing the free exercise claim advanced by the Amish from a position of neutrality.

In the end, the Court held that forcing the Amish children to attend school past the eighth grade would constitute "severe interference" with religious freedom. However, the Court also cautioned that few other religious groups could make claims similar to the Amish.

The unchallenged testimony of acknowledged experts in religious history and education convinced the justices that compulsory high school attendance could result in significant psychological harm to the Amish children and, even, the eventual destruction of the church-oriented agrarian community developed over centuries by the Amish people. Having been raised in an insular community where the welfare of the group is emphasized over individualism, the Court reasoned that high school attendance would place the Amish children "in an environment hostile to Amish beliefs" due to the emphasis on competition and pressures to conform to the ways of the majority.

High school attendance would also remove the Amish children from their community "physically and emotionally, during the crucial and formative adolescent period of life." This type of disruption, over an extended period of time, could pose a realistic threat to the continued survival of this unique religious subculture. Burger, in a passage that exhibited nostalgic sentimentality, paid homage to the Amish for their "devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life."

Writing in dissent, Justice Douglas expressed a concern for the rights of the Amish children. As he stated:

> *If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.*

LESSON 1: FOLLOW-UP DISCUSSION QUESTIONS

1. By appearing to favor monogamy over polygamy, or by granting the Amish an exemption from a law that still applied to others, was the government "establishing" religion?

2. Was it inconsistent to grant the Amish an exemption from the school attendance statute after the Mormons had been prohibited from practicing polygamy, assuming that both sects were sincere in their respective beliefs? Does the free exercise of religion clause in the Bill of Rights apply equally to all citizens?

3. Are there other circumstances that would justify allowing a parent to remove his or her child from school before the age of sixteen?

4. In his opinion Chief Justice Warren Burger wrote that a way of life should not be condemned simply because it is "different." Why is it important to protect the rights of minority groups like the Amish?

5. Do you agree with the Court's decision in this case? Why or why not?

6. What would be the dangers associated with establishing a state or national religion? Would there be any benefits?

LESSON TWO

Case: *Wallace v. Jaffree*, 1985 (472 U.S. 38; 105 S.Ct. 2479).

Issue: Does a state law that mandates a one-minute period of silence at the opening of each public school day, for "meditation or voluntary prayer", violate the First Amendment's establishment of religion clause?

Objectives: At the conclusion of the lesson students should be able to:

1. define what is meant by the phrase "establishment of religion";
2. identify common traditions in American culture that some observers consider violations of the establishment clause;
3. consider whether the government can or should maintain a policy of complete neutrality on the subject of religion;
4. recognize that the protection of minority rights is as essential as majority rule in a democratic and pluralistic society;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 2: BACKGROUND AND FACTS

The Constitution does not specifically state that a "wall of separation" must be maintained between church and state. The phrase did not appear until 1802, after the ratification of both the Constitution and the Bill of Rights. Thomas Jefferson, in a letter to a Baptist congregation in Danbury, Connecticut, utilized the now famous metaphor to express his concern that the integrity of government required just such a wall of separation.

Jefferson's phrase has been invoked on numerous occasions by the Supreme Court to illustrate the meaning of the First Amendment's establishment clause. Justice Hugo L. Black, in *Everson* v. *Board of Education* (1947), wrote: "In the words of Jefferson, the clause against the establishment of religion by laws was intended to erect a 'wall of separation between Church and State'." It was in the *Everson* case that the Court ruled that the Fourteenth Amendment incorporated the establishment clause and thereby protected individuals from violations of the principle by state governments.

Though still subject to interpretation, since the *Everson* decision the Supreme Court has consistently held that the establishment clause not only prevents the designation of either a national or state religion, it also prevents government from assisting one religion or all religions, or from showing preference to any particular religion. But is the prohibition against the establishment of religion the same as erecting a wall of separation between church and state? This is a valid question when one considers that the motto "In God We Trust" is stamped on federal currency, Christmas is designated a national holiday, sessions of Congress open with a prayer, and liquor stores in many states are required by statute to be closed on Sundays.

It is unlikely that the Framers of the Constitution contemplated the influence of religion upon public schools simply because government-supported schools were virtually non-existent in most parts of the country in the late eighteenth century. Nevertheless, as a document subject to interpretation, the Constitution has been implemented to settle contemporary issues such as the use of prayer in public schools.

In 1962, in *Engel* v. *Vitale*, the Supreme Court ruled that the recitation of a state-sponsored non-denominational prayer in a public school was an unconstitutional violation of the establishment clause, even though student participation was voluntary. The Court recognized that the classroom is a unique environment where "coercive pressure" could convince potential dissenters to conform.

Despite the Court's reasoning, very few decisions have been as unpopular as its holding in *Engel*. During the two decades that followed the 1962 decision in *Engel*, public opinion surveys consistently showed widespread support for the inclusion of prayer in public schools. Over half of the members of Congress supported a proposed amendment to the Constitution to meet this objective, though the vote failed to attain the two-thirds majority needed to set the amendment process in motion. Approximately half of the nation's fifty states did resort to "moment of silence" provisions to circumvent the Court's pronouncement. Open defiance of the ruling was not uncommon as teachers in countless school districts across the country continued to lead their classes in prayer. It was during this turbulent era that the state of Alabama enacted a law that would again require the Supreme Court to address the issue of prayer in public schools.

In 1978, the Alabama legislature passed a bill which stated that at the beginning of each day in the state's public schools "a period of silence, not to exceed one minute in duration, shall be observed for meditation." In 1981 a second law was enacted which further stated that the moment of silence "shall be observed for meditation or voluntary prayer." It was the addition of the words "or voluntary prayer" that precipitated a legal battle that reached the Supreme Court in 1985 under the heading *Wallace* v. *Jaffree*.

In 1982 Ishmael Jaffree, a lawyer in Mobile, Alabama, filed a suit on behalf of three of his children. The children were all students in public schools in Mobile. The suit claimed that the 1981 statute, which required a moment of silence "for meditation or voluntary prayer", violated the establishment clause of the First Amendment as applied to the state of Alabama via the due process clause of the Fourteenth Amendment. Jaffree was seeking an injunction to prevent the governor of Alabama, George Wallace when the case eventually reached the Supreme Court, from enforcing the statute.

Though not directly related to the constitutionality of the 1981 statute, Jaffree, a self-proclaimed agnostic, had an additional concern. He had discovered that the teachers of all three of his children were exceeding the letter of the law by leading their respective classes in the recitation of prayers. Jaffree and his wife were determined to allow their children to develop their own religious beliefs, and they perceived this classroom activity as coercive and improper. It was only after the teachers and other school officials ignored his requests to discontinue the organized prayers that Jaffree sought relief from the courts. The lawsuit itself made the Jaffree family the target of ridicule and even threats in their own community.

When the dispute reached the United States Supreme Court, the lawyers representing Alabama emphasized that the only type of prayer deemed permissible under the 1981 law had to be both silent and voluntary. Therefore, they reasoned, students who utilized the moment of silence in the appropriate manner were protected by the equally important free exercise of religion clause which, like the establishment clause, is contained in the First Amendment.

Jaffree's legal counsel responded by arguing that the primary intent of the 1981 statute was to encourage impressionable children that prayer was a favored activity by adding the words "or voluntary prayer" to the 1978 moment of silence law. To this end they relied heavily upon an admission by the state senator who sponsored the 1981 revision of the moment of silence provision that the sole purpose of the bill was to return prayer to the public schools. For Jaffree this legislative revision was essentially an endorsement of prayer which contravened the state's neutrality on religious matters. Jaffree's lawyers reminded the Court that diligent enforcement of the establishment clause is a necessity in a nation characterized by religious pluralism and diversity.

LESSON 2: DECISION

The Supreme Court, by a 6-3 vote, ruled in favor of Ishmael Jaffree when it declared that the Alabama law was an unconstitutional violation of the establishment clause. Justice John Paul Stevens wrote the majority opinion. For Stevens the intent or purpose of the statute was of paramount importance. To this end he observed that the law was "entirely motivated by a purpose to advance religion" and, as a result, it had "no secular purpose."

Stevens appeared to embrace Jefferson's concept of the need for a wall of separation between church and state when he wrote:

> *The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.*

The majority detected nothing in the original moment of silence statute, enacted in 1978, that would prohibit prayer that was silent and voluntary. Therefore, the added reference to prayer in the 1981 law was viewed as a blatant effort by the Alabama legislature to place the state's imprimatur upon prayer as a favored activity. It was this indication of partiality that violated the neutrality standard that is inherent in the First Amendment's establishment clause.

Concerning the other reference to religion found in the First Amendment, Justice Stevens reasoned that the free exercise clause would apply equally to those students who decided not to pray during a moment of silence as it did to those who did elect to engage in silent prayer. Stevens asserted that the unambiguous conclusion of the Court was that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." In this light, one could argue that the establishment clause and the free exercise clause are not only complimentary, they are virtually inseparable. Therefore, when a state endorses prayer it can only do so in a coercive manner that violates both of the religion clauses engraved in the First Amendment.

The constitutionality of the 1978 statute, which simply mandated a moment of silence for "meditation", was not at issue when Jaffree's complaint reached the Supreme Court. However, concurring opinions by Justices Powell and O'Connor indicated that provisions of this nature, sans any reference to "prayer", are acceptable.

According to Justice O'Connor, "a moment of silence is not inherently religious" and, furthermore, "a pupil who participates in a moment of silence need not compromise his or her beliefs." Apparently, in this case that originated in Alabama, the use of the word "meditation" in the initial statute can be viewed as less incendiary than the word "prayer" in the revised statute even though to many the two words are synonymous. Currently, at least twenty-five states permit or require a moment of silence in the public school classrooms under their supervision.

In a dissenting opinion, Chief Justice Warren Burger was quick to point out that, despite the establishment clause, Supreme Court sessions regularly open with the invocation "God save the United States and this honorable court." Additionally, sessions of Congress open with a prayer that is offered by a chaplain who is paid at the public's expense. For Burger, the Alabama statute was no more offensive that these traditional ceremonies.

Burger argued that it is possible for a statute to allow for prayer without simultaneously issuing an endorsement of the activity. His strongest comment concerned the neutrality standard:

> *To suggest that a moment-of-silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality, but hostility toward religion.*

Burger thus refused to subscribe to the position that the statute posed a realistic threat to religious liberty. Rather, he viewed the legislation as an affirmation of the "values of religious freedom and tolerance that the Establishment Clause was designed to protect."

Justice William Rehnquist argued against the idea of a "wall of separation" between church and state. He claimed that the establishment clause was designed only to stop the government from preferring one religion over another. The government could, argued Justice Rehnquist, provide support for religious activities in public schools as long as all religions were treated equally or non-preferentially.

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LESSON 2: FOLLOW-UP DISCUSSION QUESTIONS

1. Justice Stevens proclaimed that "government must pursue a course of complete neutrality toward religion." Do you agree that this policy promotes the common good of the nation?

2. In dissent, Chief Justice Burger declared that the Court's ruling in this case "manifests not neutrality, but hostility toward religion." Do you agree or disagree?

3. Proponents of prayer in school often claim that rulings such as the one in this case violate the religious liberty of the majority. Do you agree or disagree?

4. Should a state have the authority to allow public school teachers to lead their classes in prayer if students who object to the practice are allowed to leave the room?

5. Does the school environment place too much emphasis on conformity? Are students encouraged to be independent free thinkers?

6. Does a "wall of separation" currently exist in the United States between church and state? Is such a wall attainable or advisable?

7. Do you agree with the opinion of the Court in this case? Or do you agree with the dissenting opinions in this case? Why or why not?

LESSON THREE

Case: *Edwards v. Aguillard*, 1987 (482 U.S. 578; 107 S.Ct. 2573).

Issue: Does a state law that requires equal time for "creation science", in public school courses that cover evolutionary theory violate the establishment of religion clause?

Objectives: At the conclusion of the lesson students should be able to:

1. discus the influence of religious movements upon the enactment of laws in the United States;
2. understand the standards used by the Supreme Court to measure possible violations of the establishment clause;
3. distinguish secularism from sectarianism;
4. trace the historical roots of the contemporary conflict between creationism and evolutionary theory;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 3: BACKGROUND AND FACTS

In 1925 Lucille Milner, a secretary for the American Civil Liberties Union in New York City, clipped an article from a newspaper that reported the passage of a bill, by the legislature in Tennessee, that made it illegal for public schools to teach anything but the literal interpretation of human creation that is found in the Bible. She brought the newspaper item to the attention of Roger Baldwin the director of the ACLU, and he responded with a press release that offered legal assistance for anyone who would challenge the law.

Baldwin's offer caught the eye of a young businessman named George Rappelyea in the relatively obscure town of Dayton, Tennessee. Rappelyea persuaded John Scopes, a biology teacher at the local high school to initiate a test case by teaching the theory of organic evolution derived from the work of Charles Darwin. Scopes anticipated nothing more than a quiet legal battle over the validity of the statute, while Rappelyea hoped that the litigation would focus enough of a spotlight on Dayton to provide a boost for the local economy.

The result of this chain of events was the infamous Scopes "monkey trial." Hordes of reporters and spectators migrated to Tennessee for the trial that lasted eight days. Vendors in Dayton sold Bibles and toy monkeys outside the court house as a carnival atmosphere surrounded the proceedings. For the first time in the nation's history a jury trial was broadcast live on radio.

The state's case was handled by the noted orator, William Jennings Bryan. Bryan had been a three-time presidential candidate prior to serving as Secretary of State under Woodrow Wilson. The defense team financed by the ACLU was headed by Clarence Darrow, the most famous criminal lawyer of the era. When Darrow entered the courtroom he discovered a large banner that implored people to "Read Your Bible Daily", which was not removed until the renowned attorney demanded equal space for a "Read Your Evolution" banner.

Judge John Raulston, who allowed a preacher to open each day of the trial with a prayer, confined the focus of the case to the right of the state legislature to control public education. As a result, an assemblage of experts on evolutionary theory was not allowed to testify for the defense. Darrow resorted to calling Bryan as his sole witness, in the guise of an expert on religion, and this confrontation has been immortalized as the most dramatic moment of the trial.

In the end, John Scopes was convicted and fined one hundred dollars for violating the Tennessee law that made it illegal for a public school teacher to advance "any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals." However, in 1927 the Tennessee Supreme Court voided Scopes' conviction on a technicality—the judge, rather than the jury, had set the fine. In theory the statute was left standing as the state's highest court stated that it saw "nothing to be gained by prolonging the life of this bizarre case" since Scopes was no longer employed by the state. The practical result was that no further efforts were made to enforce the statute upon the court's instruction that a "nolle prosequi" be entered in the interests of "the peace and dignity of the state." The Tennessee ban on evolutionary theory never reached the U.S. Supreme Court.

Following the controversy in Tennessee only two states, Arkansas and Mississippi, enacted laws to prevent the theory of evolution from being taught in public schools. The Arkansas statute was designed to prohibit "the theory or doctrine that mankind ascended or descended from a lower order of animals." This enactment in 1928 was obviously patterned after the Tennessee statute.

The principal effect of the Scopes trial was that for decades many textbook publishers and biology teachers simply avoided the controversy that surrounded evolutionary theory by remaining mute on the subject. In 1957, however, national attention was focused on the quality of science education in the United States when the Soviet Union launched a space satellite known as Sputnik. One of the by-products of this emphasis on science was the introduction of school textbooks that included detailed chapters on organic evolution.

In 1965 Susan Epperson, a young biology teacher at a public high school in Little Rock, challenged the Arkansas statute which prohibited the use of any textbook which contained information on organic evolution. The law also prohibited teaching evolutionary theory. The textbook in question had been adopted by the school administration on the recommendation of the school system's biology teachers. Epperson faced the dilemma of being assigned a textbook by her employer, the school system, which contained a statutorily condemned chapter.

Epperson was assertive about her desire to present evolutionary theory to her students. In her eyes, to avoid the topic would be a negligent violation of the students' right to a high-quality education. On the other hand, the law stipulated that a violation of the state ban on teaching evolutionary principles was both a misdemeanor and grounds for the teacher's dismissal.

Epperson filed a lawsuit which sought to have the statute nullified and to prevent her dismissal by the education authorities in Arkansas. When the U.S. Supreme Court decided *Epperson v. Arkansas* in 1968 it held that the state's ban on teaching the basics of evolutionary theory in public schools was a transgression upon the neutrality required by the First Amendment's establishment clause.

Justice Fortas delivered the opinion for a unanimous Court and he recognized that the statutory prohibition was enacted in 1928 solely to prevent the dissemination of information "deemed to conflict with a particular interpretation of the Book of Genesis." Fortas was emphatic when he wrote:

> *There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.*

Justice Fortas depicted the Arkansas statute as "a product of the upsurge of 'Fundamentalist' religious fervor of the twenties." After relating that there was no record of any prosecution under the statute, Fortas speculated that the anti-evolution law was "more of a curiosity than a vital fact of life." However, thirteen years after the *Epperson* decision the State of Louisiana enacted a law that would once again place the debate over evolution on the Supreme Court's docket.

In 1981 the Louisiana legislature passed a bill titled the Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act. Unlike the laws that were questioned in both the notorious Scopes trial and the *Epperson* case, this Louisiana law did not specifically ban the dissemination of evolutionary theory. Rather, the Louisiana statute required equal time for creationism whenever evolution was covered in a public school course. The same standard was applied to teaching evolutionary theory whenever the Biblical interpretation of creation was presented in the classroom. Neither theory had to be presented unless the other was taught.

Don Aguillard, an assistant principal at Acadiana High School in Louisiana, headed a group that challenged the "equal time" law on the grounds that it was an unconstitutional violation of the establishment clause that is contained in the First Amendment and applied to the states via the liberty component of the Fourteen Amendment's due process clause. Aguillard was represented by the American Civil Liberties Union and this class action suit included several teachers, parents of students, and religious leaders from the community.

Representatives for Louisiana rejected Aguillard's charge that creationism is the product of religious dogma and not a universally accepted science. The state's fundamental contention was that creationism is supportable by sufficient scientific evidence to mandate equal time in a curriculum that also covers evolutionary theory. The law was therefore purported to have a a clear secular purpose, namely to protect academic freedom by providing students with a balanced introduction to theories concerning the origin of mankind.

LESSON 3: DECISION

In *Edwards* v. *Aguillard* (1987), the Supreme Court ruled, by a 7-2 vote, that Louisiana's 1981 Balanced Treatment Act was an unconstitutional violation of the establishment of religion clause found in the First Amendment. The Court did not examine the scientific validity of creation science. Rather, its analysis focused upon the intent of the state legislature.

In 1971, in *Lemon* v. *Kurtzman*, the Court developed a test whereby to measure potential violations of the establishment clause. This so-called Lemon Test provided future justices with three criteria, and a law had to pass all three prongs of the test to be pronounced constitutional. First, the primary purpose of the law must be secular and not religious. Second, the principal effect of the law must not be to either advance or inhibit religion. Third, the law must not create an excessive entanglement between government and religion. Whenever a law endorses religion, and thereby lacks a secular purpose, no consideration of the second or third criteria is required.

Justice William J. Brennan, writing for the majority in *Edwards* v. *Aguillard*, investigated the legislative history of the Louisiana statute and discovered that the law lacked the requisite secular purpose. During a hearing held prior to the enactment of the law, the bill's sponsor stated that his preference was for public schools to teach neither creationism or evolution. For Brennan this was an overt signal that an effort was being made to undermine scientific education by narrowing the curriculum.

Cognizant that the Constitution created a federal system of government, Brennan noted that the states and local school boards " are generally afforded considerable discretion in operating public schools." On the other hand, Brennan also observed that mandatory attendance requirements allow the states to exert "great authority and coercive power" over impressionable children. For this reason, the Court is "particularly vigilant in monitoring compliance with the Establishment Clause" in public schools.

Concerning the state's argument that the legislation was required to safeguard academic freedom, Brennan was particularly outspoken. He wrote:

> *While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.*

Brennan was in full agreement with the Court of Appeals' assessment that the purpose of the legislation was not to protect academic freedom, it was simply to discredit evolution "by counter-balancing its teaching at every turn with the teaching of creationism." Justice Brennan's final conclusion on the sectarian nature of the legislation was that its "preeminent purpose" was to "advance the religious viewpoint that a supernatural being created humankind."

In dissent, Justice Antonin Scalia cautioned that it is misleading to assume that the sole purpose of a law is to advance religion "merely because it was supported strongly by organized religions." Scalia defended the right of religious men and women to participate in the political process when he reasoned that just as religious activism was a prime factor in the abolition of slavery, religious activism can contribute to the common good now and in the future.

Scalia was equally concerned about how accurately the Supreme Court could measure the legislature's intent. According to Scalia, the only direct evidence presented to the Court were transcripts from seven committee hearings, several of which were "sparsely attended."

Justice Scalia refused to accept the majority's conclusion that Louisiana's concern for academic freedom was a sham. He wrote:

> *Witness after witness urged the legislators to support the Act so that students would not be 'indoctrinated' but would instead be free to decide for themselves, based upon a fair presentation of the scientific evidence, about the origin of life.*

Concerning available scientific evidence, Scalia referred to "ample uncontradicted testimony that 'creation science' is a body of scientific knowledge rather than revealed belief." On the other hand, a brief filed on behalf of Aguillard by seventy-two Nobel laureates argued that creationism is not based on scientific research.

Ostensibly, creationists found allies on the Supreme Court for the first time, as both Scalia and Chief Justice Rehnquist were in dissent with the ruling in *Edwards* v. *Aguillard*. Still, the combined effect of this case and the earlier *Epperson* decision is clear and undeniable. John Scopes has been vindicated.

LESSON 3: FOLLOW-UP DISCUSSION QUESTIONS

1. In the majority opinion Justice Brennan wrote that the Supreme Court had to be "particularly vigilant" about protecting the establishment clause from the "coercive power" of local school authorities. Does Supreme Court supervision contradict the tenets of federalism?

2. Did Louisiana's Balanced Treatment Act lack a secular purpose or was it necessary to protect academic freedom?

3. Is it possible for the Supreme Court to accurately read "legislative intent " as is required by the Lemon Test? How important are the public statements made by elected officials, including the sponsors of particular bills?

4. In a concurring opinion, Justice Powell wrote that "a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events" because "religion permeates our history." Do you agree? Are courses in comparative religion constitutionally appropriate?

5. One of the requirements of the Lemon Test is that a statute can neither advance nor inhibit religion. Was the ruling in *Edwards v. Aguillard* "hostile" to religion?

6. Supporters of the Louisiana statute claimed that without equal time for creationism students would be "indoctrinated" in the classroom concerning the origin of life. Do you agree?

7. Do you agree with the Court's opinion in this case? Why or why not?

LESSON FOUR

Case: *Board of Education of the Westside Community Schools v. Mergens*, 1990 (496 U.S. 226; 110 S.Ct. 2356).

Issue: Is it a violation of the First Amendment's Establishment Clause for a public school to allow a student group to hold religious meetings on school grounds during non-instructional time?

Objectives: At the conclusion of the lesson students should be able to:

1. discuss whether or not religious groups should have equal access to public school facilities;
2. consider whether the school's curricular objectives would be jeopardized by the activity of a student group;
3. discuss the difference between the toleration of religious speech and the endorsement of religious speech;
4. consider the application of the establishment clause to the public school setting;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 4: BACKGROUND AND FACTS

Despite Thomas Jefferson's desire for a wall of separation, conflicts between church and state have been inevitable. In recent decades the United States Supreme Court has served as the principal arena for debates over just how high this wall of separation should be constructed. Many of these disputes over the application of the First Amendment's establishment clause have originated in public schools that were established and that continue to be maintained by the states for the general welfare of the nation.

In 1948, in *Illinois ex rel. McCollum* v. *Board of Education*, the Supreme Court held that public schools could not allow religious instruction classes to be conducted on school grounds during the school day. Even though students were voluntarily enrolled in these classes by their parents, and despite the fact that the instructors were not employed by the state, the Court viewed the "released time" sessions on the premises of a public school as being in violation of the establishment clause.

Four years later, however, in *Zorach* v. *Clauson* (1952), the Supreme Court did vote to allow a released time program for religious instruction which required that the classes be held off public school grounds. Some observers saw this decision as a form of accommodation since the classes were still being attended by public school students during regular school hours. As in the previous case, participation in the program was voluntary.

More recently, in *Widmar* v. *Vincent* (1981), the Supreme Court ruled that whenever the facilities of a state university are available to registered student organizations, university officials cannot exclude a bona fide student group solely because the purpose of the group's meeting is to express ideas that are religious in nature. The Court emphasized that the First Amendment prohibits content-based state restrictions upon free speech. As a result, a student organization that engages in religious expression cannot be denied "equal access" to facilities that a state university makes accessible to other groups.

Moderate members of Congress, reading between the lines of the *Widmar* decision, saw the Court's equal access doctrine as a possible basis for a compromise on the volatile school prayer issue. It was hoped that a piece of legislation fashioned in this light could placate the increasingly vocal factions that favored the recitation of prayer in public schools without inciting those who advocated a strict separation of church and state. The result of this compromise was the Equal Access Act of 1984.

Essentially, the Equal Access Act extended the *Widmar* precedent to public secondary schools that received federal financial assistance. The Act stipulated that a "limited open forum" was created by a public high school whenever at least one noncurriculum related student group was allowed to meet on school premises during noninstructional time. According to the statute, once a limited open forum was established, equal access to school facilities could not be denied to a student group due to the religious, political, or philosophical content of their speech.

The statute was qualified by the proviso that its intention was not to "limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at the meetings is voluntary". Further, these voluntary, student-initiated meetings were not to be conducted by non-school persons, and school employees could only be present in a non-participatory, custodial capacity. It was also stated that public funds were not to exceed the incidental cost of providing the space for the meeting.

Not long after the passage of the Equal Access Act, a dispute began in Omaha, Nebraska that would eventually test the constitutionality of the law. In 1985 Bridget Mergens was a senior at the Westside High School in Omaha. She was a member of the school's choir and drama club whose schedule included advanced placement classes. Her desire to establish a Bible-discussion group at the high school launched the legal battle that eventually would require the attention of the U.S. Supreme Court.

In January, 1985 Bridget Mergens headed a group of students that presented the principal of Westside High School, James Findlay, with a formal request for permission to form a Christian Bible club at the school. This proposed club would have the same privileges and responsibilities as the other student clubs at the high school, except it would not have a faculty sponsor. The stated purpose of the club was to provide students with an opportunity to read and discuss the Bible, and to pray together. Membership was to be voluntary and open to all students, regardless of their religious affiliation.

The school system did not have a written policy concerning the formation of student clubs. Rather, it was left to school officials to consider each request before reaching a decision on whether or not the stated goals and objectives of the club in question were consistent with the policies and guidelines established by the school board. Actually, prior to this request by Bridget Mergens and her fellow students, no group had been denied access to school facilities. Westside High School had approximately thirty student clubs that met on a voluntary basis during noninstructional time on school premises. These clubs were officially recognized by the school system as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills."

In February the request to form the Christian Bible club was denied by the high school's principal. Subsequently, the proposal was also rejected by the school system's assistant superintendent, James Tangdell, and by the superintendent of Westside Community Schools, Kenneth Hanson. Collectively, the school officials reasoned that all student groups were required to have a faculty sponsor, which would not be appropriate in this case. It was also their contention that the presence of a religious club in a public school would contravene the First Amendment's establishment clause.

In March of 1985 Mergens appealed the denial of the request to the school board. The students amended their original proposal by stating that if a faculty sponsor was required it would be both proper and acceptable for such a person to simply oversee the meetings by serving in a custodial capacity. Nevertheless, the school board voted to uphold the denial on the grounds that school buildings were to be used solely for curriculum related activities that were sponsored by the school system.

Undaunted, the students filed a law suit in the United States District Court for the District of Nebraska in April, 1985. The suit alleged that the school officials had violated the Equal Access Act by denying the request to establish a Bible study club. The students also argued that the representatives of the school system had abrogated their First and Fourteenth Amendment rights to freedom of speech, assembly and association, and free exercise of religion.

To support their claim the students contended that the high school had established a limited open forum by allowing student clubs that were not curriculum related to use school facilities. Specifically, the suit cited the chess club and the scuba diving club as prime examples of student clubs that fell into this category. Since Westside High School received federal funds, the provisions of the Equal Access Act would be applicable if the students' contention was correct.

The district court ruled against the students, accepting the school system's contention that all of the student clubs were curriculum related which nullified the existence of a limited open forum. Without the necessary limited open forum, the Equal Access Act could not be applied to Westside High School and any constitutional claim rendered by the students would be moot. Given this set of circumstances, the district court ruled that the school officials had acted in a reasonable manner.

Bridget Mergens and the other students appealed this decision to the U.S. Court of Appeals for the Eight Circuit which reversed the lower court decision. Ruling in favor of the students, the appellate court rejected the school system's crucial claim that all of the student groups were curriculum related. The court's opinion reasoned that such a broad interpretation of the phrase "curriculum related" would make the provisions of the Equal Access Act virtually meaningless because any school could then "arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content." This, according to the Court of Appeals, was "exactly the result that Congress sought to prohibit" by enacting the Equal Access Act in 1984.

The Court of Appeals also rejected the school system's claim that the Equal Access Act violated the establishment clause. The statute was viewed as a reasonable extension of the *Widmar* v. *Vincent* precedent to public secondary schools. The judges noted that Congress had considered the difference in maturity level between secondary and university students prior to enacting the legislation. On the other hand, in the *Widmar* decision the Supreme Court stated that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."

Subsequently, the school system appealed to the U.S. Supreme Court which agreed to hear arguments on this case. The Supreme Court would have to consider two main issues. First, were student groups such as the chess club and the scuba diving club noncurriculum related? If so, then the limited open forum at Westside High School would require the application of the Equal Access Act. Among the law's provisions was the stipulation that equal access to public school facilities cannot be denied due to the religious, political, or philosophical content of a student group's speech. Unfortunately, Congress had not fully defined the term "noncurriculum related" and the phrase was thus left open to the interpretation of the Supreme Court.

In addition to ruling on the applicability of the Equal Access Act in this case, the second issue before the Court was whether or not the Act itself was a violation of the First Amendment's establishment clause. In this regard it is important to consider the Supreme Court's ruling in *Lemon v. Kurtzman* (1971), which established the standard to measure a piece of legislation against the requirements of the establishment clause. To be considered constitutional a law had to pass all three prongs of this so-called Lemon test. First, the primary purpose of a law must be secular and not religious. Second, the principal effect of the law should not advance or inhibit religion. Third, the law must not create an excessive entanglement between government and religion.

In *Board of Education of the Westside Community Schools v. Mergens* (1990), the Supreme Court was once again being called upon to measure the height of the wall that stands between church and state.

LESSON 4: DECISION

After ruling that the Equal Access Act was applicable in this case, the Supreme Court announced that the Act itself was constitutional. The vote in *Board of Education of the Westside Community Schools v. Mergens* (1990) was 8-1, with the majority opinion written by Justice O'Connor. Concurring opinions were offered by Justice Kennedy and Justice Marshall, while Justice Stevens filed the lone dissenting opinion.

Regarding the applicability of the Act, the majority examined the term "noncurriculum related student group" and decided that the phrase "is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school." The Court then examined the facts as presented in this case and decided that student groups such as the chess club and the scuba diving club were not directly related to the body of courses offered at Westside High School. O'Connor wrote that even if a public secondary school allowed only one noncurriculum related student group to meet then a limited open forum would be in place, thereby triggering the legal obligations of the Equal Access Act. As a result, the school was prohibited from denying other student groups equal access to its facilities on the basis of the religious, political, or philosophical content of their speech.

Justice O'Connor then directed her attention to the important constitutional question, whether or not the Equal Access Act was a contradiction of the First Amendment's establishment clause. The school system had argued that since student activities were recognized as an integral part of the school system's educational mission, official recognition of the proposed Bible club would effectively incorporate religious activities into the school's official program. The inference was that this type of recognition by a public school would endorse participation in the religious club and, thereby, violate the establishment clause.

Justice O'Connor invoked the Lemon test to settle the constitutional issue. First, the purpose of the law was judged to be a requirement that public secondary school facilities would be available to student groups on a nondiscriminatory basis whenever a limited open forum had been established. The legislation was therefore regarded as being secular in nature.

The second prong of the Lemon test prohibits government from advancing religion. Justice O'Connor observed that there were a number of safeguards in place to prevent this from taking place. The clubs at the high school were student-initiated and meetings were held during noninstructional time. Westside High School also had a wide spectrum of student clubs to "counteract any possible message of official endorsement of or preference for religion or a particular religious belief." O'Connor conceded that there was a possibility of peer pressure on the part of the students, "but there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." In this regard, O'Connor made the following distinction:

> *[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.*

Finally, the Lemon test prohibits an excessive entanglement between government and religion. The majority opinion noted that the Equal Access Act specifically prohibited faculty monitors from participating in religious meetings. However, a faculty monitor could oversee a meeting without being an active participant and, as was outlined in the majority opinion, "such custodial oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities."

In a concurring opinion, Justice Kennedy suggested an alternative method for measuring potential violations of the establishment clause that would not be as stringent as the Lemon test. In Kennedy's analysis the establishment clause was designed to prohibit the government from either attempting to establish a state religion, or from coercing individuals into participating in a religious activity. Since the Equal Access Act would pass both hurdles of Kennedy's test, he concluded that the law was constitutional. For Kennedy it was imperative that the government retain a position of neutrality concerning religion.

Justice Marshall, in his concurring opinion, agreed that the Equal Access Act was constitutional, but he did not hesitate to issue a stern warning as well as suggestions for the nation's public secondary schools. Marshall observed that the difference between the toleration of religious speech and the endorsement of religious speech is founded upon the type of forum that is created, and not necessarily upon the maturity level of the students. For example, the university that was the focus of the *Widmar* decision maintained a broad spectrum of advocacy oriented student groups. Conversely, Westside High School did not have a single student club that was designed to espouse a specific religious, political, or philosophical point of view when Bridget Mergens proposed the creation of a Christian Bible club.

Marshall also feared that since student clubs were promoted "as a vital part of the education program", the common perception might be that the religious speech in question carried the public school's endorsement. Marshall wrote:

> *The entry of religious clubs into such a realm poses a real danger that those clubs will be viewed as part of the school's effort to inculcate fundamental values. The school's message with respect to its existing clubs is not one of toleration but one of endorsement.*

Justice Marshall suggested two possible ways for public secondary schools to lessen the chance that its toleration of religion would be mistaken for an endorsement. To prevent confusion a school could entirely discontinue encouraging student participation in clubs and clarify that the clubs are not instrumentally related to the school's overall mission. As a second option, a school could continue its general endorsement of only those student clubs that did not engage in potentially controversial religious, political, or philosophical speech.

Justice Marshall deduced that while it is permissible for a public school to encourage its students to become well-rounded as student-athletes, student-musicians, or student-tutors, "the Constitution forbids schools to encourage students to become well-rounded as student-worshipers."

In a dissenting opinion, Justice Stevens held that the facts in *Mergens* did not require an examination of the constitutionality of the Equal Access Act. Unlike the university examined in *Widmar v. Vincent*, Stevens did not believe that Westside High School had established a limited open forum which is a prerequisite for the application of provisions contained in the Equal Access Act. Stevens reached this conclusion because, unlike the other justices,he accepted the school system's position that all of its existing clubs were curriculum related. As Stevens wrote:

> *[A] high school could properly sponsor a French club, a chess club, or a scuba diving club simply because their activities are fully consistent with the school's curricular mission. It would not matter whether formal courses in any of those subjects—or in directly related subjects—were being offered as long as faculty encouragement of student participation in such groups would be consistent with both the school's obligation of neutrality and its legitimate pedagogical concerns. Nothing in* **Widmar** *implies that the existence of a French club, for example, would create a constitutional obligation to allow student members of the Ku Klux Klan or the Communist Party to have access to school facilities.*

Even though Stevens did not feel that it was necessary to rule on the constitutionality of the Equal Access Act, he did not hesitate to offer words of caution regarding a possible violation of the establishment clause. As he wrote:

> *The Act, as construed by the majority, comes perilously close to an outright command to allow organized prayer, and perhaps the kind of religious ceremonies involved in* **Widmar**, *on school premises.*

LESSON 4: FOLLOW-UP DISCUSSION QUESTIONS

1. Should religious groups have equal access to public school facilities? Are there specific groups that should be excluded from school grounds?

2. Are clubs such as a chess club or a scuba diving club actually curriculum related? Why or why not?

3. Do you agree or disagree with Justice O'Connor's suggestion that there could be unwarranted peer pressure on students to join a religious club?

4. The test suggested by Justice Kennedy to measure a law's constitutionality in relationship to the establishment clause would appear to construct a lower "wall" between church and state than is mandated by the Lemon test. Which standard do you think the Supreme Court should follow?

5. Justice Marshall feared that religious groups would appear to carry the public school's endorsement if meetings were conducted on school premises. Was this concern valid? Would it be reasonable for a public school to use either of the disclaimers that were suggested by Marshall?

6. Justice Stevens was concerned that the majority opinion in *Mergens* was a step toward allowing organized prayer in the nation's public schools. Was his concern justified?

7. Should non-student groups that are religious or political in their orientation have access to public school facilities? If so, under what conditions?

III

FREEDOM OF EXPRESSION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble ...

—*First Amendment to the Constitution of the United States of America*

Lessons on Supreme Court Cases:

Lesson 5 - *West Virginia State Board of Education* v. *Barnette* (1943)
Lesson 6 - *Tinker* v. *Des Moines School District* (1969)
Lesson 7 - *Bethel School District* v. *Fraser* (1986)
Lesson 8 - *Hazelwood School District* v. *Kuhlmeier* (1988)

LESSON FIVE

Case: *West Virginia State Board of Education v. Barnette*, 1943 (319 U.S. 624; 63 S.Ct. 1178).

Issue: Can a state require public school students to salute the flag or do individuals have a constitutional right to remain silent?

Objectives: At the conclusion of the lesson students should be able to:

1. consider the balance between majority rule and minority rights;
2. discuss the difference between judicial restraint and judicial activism;
3. consider the role that established precedents play in making a Supreme Court decision;
4. determine if a religious exemption to a generally acceptable law violates the establishment of religion clause;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 5: BACKGROUND AND FACTS

In the Preamble to the Constitution, the framers of the document stated that it was their intention to "secure the Blessings of Liberty to ourselves and our Posterity." It follows that before the government can infringe upon an individual's liberty there must be a compelling public reason. It also follows that when a limited government has been established, the content of a law should be both fair and reasonable. In American jurisprudence this principle is known as substantive due process.

During times of war or national emergency legislators often propose and enact laws that might otherwise be considered superfluous or unnecessary. For example, on the day after the United States declared war on Spain in 1898, the New York legislature became the first to mandate a compulsory flag salute ceremony for students in the state's public schools. By the end of Word War I, in 1919, the American Legion had launched a national campaign to persuade other states to enact similar regulations.

By 1936, Hitler and Mussolini had established totalitarian regimes in Europe and the world was on the brink of an even more destructive war. Feelings of nationalism were running high and, in addition to the eighteen state legislatures that had enacted flag salute laws, hundreds of local school boards across the country had exercised their authority in this regard. One of the school boards that had voted to compel its students to stand and salute the flag each day was located in Minersville, Pennsylvania.

When the school board made this ruling Walter Gobitis had two children, Lillian and William, who were attending public school in Minersville. The children, ages twelve and ten respectively, did not want to appear to be unpatriotic, but they had been taught that it would be a violation of their religious beliefs to salute a flag. Gobitis and his children were members of the Jehovah's Witnesses. Followers of this religious group were taught that the law of God was far superior to the laws enacted by temporal governments. The Jehovah's Witnesses subscribed to a literal interpretation of the Bible and, according to a passage in the Old Testament, the flag was a "graven image" that should not be worshiped.

Upon learning that his children would be expelled from school for refusing to stand and salute the flag, Walter Gobitis met with the members of the local school board. He did not ask the board to ban the flag ceremony from the schools under its authority. Rather, Gobitis simply requested that children who objected to the ceremony on religious grounds be allowed an exemption from participating in the flag salute. The school board denied this request, and Walter Gobitis was forced to enroll his children in a private school.

On May 3, 1937, after the cost of attending a private school proved to be a financial burden, Gobitis filed a law suit to prevent the school board in Minersville from enforcing its mandatory flag salute regulation. The Gobitis children were represented by lawyers from the national headquarters of the Jehovah's Witnesses. The American Civil Liberties Union also supported the legal action.

When the dispute was heard in a federal district court representatives for the school board insisted that the flag salute ceremony was a reasonable part of the curriculum. They argued that the ceremony had no religious content and that the secular regulation was simply designed to inculcate feelings of patriotism. On the other hand, the legal representatives for Gobitis alleged that his children had been denied their rights to freedom of speech and free exercise of religion that are contained in the First Amendment and protected against an unwarranted state action by the Fourteenth Amendment's due process clause.

The district court, and subsequently a U.S. Court of Appeals, both ruled in favor of the Gobitis children. The school board appealed to the Supreme Court which decided the case in 1940, under the title *Minersville School District v. Gobitis*.

In a sweeping 8-1 decision the Supreme Court reversed the lower court holdings by ruling in favor of the school board. The majority opinion was written by Justice Felix Frankfurter, who opened by stating that there is a need to balance "the conflicting claims of liberty and authority." The free exercise of religion is a fundamental right but, according to Frankfurter, even religious convictions cannot "relieve the citizen from the discharge of political responsibilities."

The majority in the *Gobitis* decision felt that the mandatory flag salute had a legitimate secular purpose which was not intended to persecute any particular group, religious or otherwise. The purpose of the school board's regulation, in Frankfurter's eyes, was to promote national unity. The state has a compelling interest in this regard because, in Frankfurter's analysis, national unity is "the basis of national security."

Simply allowing an exemption for those who objected to the flag ceremony on religious grounds was discounted by the majority because such an allowance "might cast doubts in the minds of other children." Lingering doubts can weaken the "binding tie of cohesive sentiment" which Frankfurter presented as the "ultimate foundation of a free society."

Justice Frankfurter was consistently one of the strongest proponents of judicial restraint in the history of the Supreme Court. In the *Gobitis* case he was willing to defer to the judgment of the local authorities because it was simply not proper for the Court to determine educational policy.

Justice Stone, who cast the single dissenting vote in *Gobitis*, was also concerned about the balance between liberty and authority. However, unlike the majority, he feared that the liberty of a small minority was being compromised for the sake of the popular will of the majority.

The fact that the flag salute was compelled by the state, through the authority of a local school board, convinced Stone that the First Amendment's guarantee of free exercise of religion was under attack. Justice Stone described the flag salute regulation as an unconstitutional effort to "coerce these children to express a sentiment which, as they interpret it, they do not entertain and which violates their deepest religious convictions."

Following the Supreme Court's decision in *Minersville School District v. Gobitis* in June of 1940, there were hundreds of reported assaults upon Jehovah's Witnesses and their property. Members of this religious group were beaten, Bible meetings were disrupted, and a meeting hall was burned to the ground. In some areas of the nation, children were committed to reformatories as a consequence of their refusal to salute the flag. In Jackson, Mississippi Jehovah's Witnesses were "banned."

In 1941 the legislature in West Virginia, influenced by the *Gobitis* decision, voted to require all of the schools in the state to conduct courses "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism." On January 9, 1942, approximately one month after the attack on Pearl Harbor, the West Virginia state board of education ordered school authorities to include a salute and pledge of allegiance to the flag in the daily program of activities. All teachers and students were required to participate. A refusal to salute the flag was considered insubordination.

If a child did refuse to salute the flag in the appropriate manner then he or she would be expelled from school. During the time of expulsion the child was designated a delinquent for being *unlawfully absent*, making the child's parents liable for a fine of fifty dollars and a jail term of thirty days.

Walter Barnette, a Jehovah's Witness who had children attending a public school in West Virginia, decided to challenge the regulation in a federal district court. The suit alleged that the regulation was an unconstitutional violation of freedom of speech and the free exercise of religion clauses which are both contained in the First Amendment. The due process clause of the Fourteenth Amendment makes both clauses binding upon individual states. The district court agreed with Walter Barnette, and it responded by issuing an injunction to prevent the state from enforcing the regulation. This decision was appealed directly to the U.S. Supreme Court.

Many legal experts were surprised by the lower court's decision, and by the Supreme Court's decision to hear full arguments on the issue so soon after the one-sided vote in *Gobitis*. Normally the courts adhere to a policy known as stare decisis which, in Latin, means "let the decision stand." Following established precedents provides stability and uniformity, since lower federal courts generally follow the lead of the Supreme Court.

Precedents provide judges with guidelines to follow, but stare decisis is not absolute. The U.S. Constitution was designed to be a "living document" open to both amendment and interpretation. Reversals of precedent are sometimes needed to correct previous errors, or to simply keep pace with changing social conditions.

Two major developments influenced the Supreme Court to reconsider the flag salute issue. First, just two years after the *Gobitis* decision, three of the justices who voted with the majority publicly announced their desire to reverse the Court's opinion in that case. The announcement came in the form of a dissenting opinion to an unrelated case, *Jones v. Opelika* (1942), that was signed by Justices Black, Douglas, and Murphy. Second, due to this tripartite defection, the two justices who had joined the Court after the *Gobitis* decision in 1940, Robert H. Jackson and Wiley B. Rutledge, now held the deciding votes on the flag salute issue.

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LESSON 5: DECISION

Reversals of precedent by the Supreme Court are relatively uncommon and it can take decades for such a change to occur. For example, almost sixty years passed before the infamous "separate but equal" doctrine established in *Plessy* v. *Ferguson* (1896) was nullified by the Court's landmark decision in *Brown* v. *Board of Education of Topeka* (1954). Therefore, it was even more remarkable that it only took three years to reverse the ruling announced in *Minersville School District* v. *Gobitis* (1940).

In *West Virginia State Board of Education* v. *Barnette* (1943), the Supreme Court ruled that it was unconstitutional for a public school to require students to participate in a flag salute ceremony. Ironically, the decision was announced on Flag Day. The vote was 6-3 as the Court's two new members, Justices Jackson and Rutledge, voted with the majority. Jackson also authored the majority opinion.

Unlike the *Gobitis* decision, which held that a mandatory flag salute did not violate the free exercise of religion clause, the majority in *Barnette* relied primarily upon the freedom of speech clause which is also contained in the First Amendment. This change in interpretation had two important results. First, this strategy meant that a religious exemption for a law that was generally considered to have a secular purpose would not be necessary. Second, by framing the flag salute question in the form of an expression issue, the Court was able to conclude that the children's silence was a type of symbolic speech. Justice Jackson saw the flag salute as "a form of utterance" and, accordingly, symbolism as "a primitive but effective way of communicating ideas."

Justice Frankfurter, writing for the majority in *Gobitis*, reasoned that a mandatory flag salute was constitutional because the state had a legitimate need to create national unity. Justice Jackson answered this claim in *Barnette* with one of the most often quoted passages from a Supreme Court decision. Jackson wrote:

> *If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.*

It was the state's use of coercion that was especially offensive to Justice Jackson. He recognized that it is proper for a state to require courses in history and government, but public education should not become the "enemy of any class, creed, party, or faction." Jackson feared that allowing a public school to disregard basic individual rights would only "teach youth to discount important principles of our government as mere platitudes." According to Jackson, a student's silence during a flag salute ceremony could hardly be cited as a "clear and present danger" to the state, therefore it was virtually impossible to justify the use of compulsion. As Jackson so aptly described:

> *Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.*

As a proponent of judicial restraint, in *Gobitis*, Justice Frankfurter cautioned that the Supreme Court should avoid becoming "the school board for the country." In *Barnette*, Jackson asserted that boards of education are not exempted from the requirements of the Bill of Rights, and the Supreme Court's duty to uphold the Bill of Rights is not dependent upon the "possession of marked competence in the field where the invasion of rights occurs." In this regard Jackson went on to write:

> *The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.*

Jackson's sentiments were echoed in a concurring opinion written by Justices Black and Douglas. They observed the following:

> *Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the*

> *people's elected representatives within the bounds of express constitutional prohibitions.*

The dissenting opinion in Barnette revealed Justice Frankfurter's disappointment at having his majority argument in *Gobitis* overturned in such a short span of time. Frankfurter, who emigrated to the United States at the age of 12, opened with an emotional reference to his own Jewish heritage. He wrote:

> *One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views of the court's opinion, representing as they do the thought and action of a lifetime.*

Frankfurter went on to emphasize that as an advocate of judicial restraint "I am not justified in writing my private notions of policy into the Constitution." Frankfurter rejected the majority's contention that the liberty component of the Fourteenth Amendment's due process clause provided the Court with the authority to prevent West Virginia from attaining "a legitimate legislative end."

Justice Frankfurter reminded the majority that it was imposing its convictions on legislators and voters who held a conflicting view. He pointed to the presence of hundreds of distinctive religious denominations in the United States and reasoned that a non-discriminatory law should not be nullified simply because it might offend one of many dissident views. As he wrote:

> *[T]he lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation.*

Frankfurter recognized that there was an inherent danger in the Court's willingness to determine which claims of conscience were protected by the free exercise clause and which were not protected. This kind of discriminatory treatment could violate the First Amendment's other religion clause, the establishment clause.

Finally, Justice Frankfurter accused the majority of using the phrase "clear and present danger" out of context. According to Frankfurter, the phrase was introduced by Justice Oliver Wendell Holmes in *Schenck v. United States* (1919) to examine seditious speech during a time of war. Frankfurter objected to applying the same test to "allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience."

Despite Frankfurter's objections, *West Virginia State Board of Education v. Barnette* (1943) stands as an important early step in the direction of judicial activism that was in support of individual rights. The decision in this landmark civil liberties case was even more remarkable when one considers that it was announced at the height of World War II. It is also worth noting that prior to the flag salute controversy in the United States, Jehovah's Witnesses objected to the fascist salute in Nazi Germany. As a result, this religious group was banned in Germany in 1933, and thousands of its followers were imprisoned in concentration camps.

LESSON 5: FOLLOW-UP DISCUSSION QUESTIONS

1. Was the flag salute controversy a free speech issue or a free exercise of religion issue? Could it be both? Why or why not?

2. Should religious minorities be exempted from laws that apply to the general public? Can you provide examples?

3. Should the Supreme Court follow a course of judicial restraint or judicial activism? What factors determine the proper role of the Court?

4. Why is it important for the Supreme Court and lower courts to follow established precedents? What problems could result from a relatively sudden reversal of precedent, as happened with the flag salute controversy?

5. What did Justice Jackson mean when he wrote that the Bill of Rights was designed to "withdraw certain subjects from the vicissitudes of political controversy"? Do you agree with him?

6. Justice Frankfurter, in his dissenting opinion, cautioned that allowing an exemption to a law for religious reasons could violate the establishment clause. Do you agree or disagree?

7. Do you think that the reports of violence directed at the Jehovah's Witnesses following the *Gobitis* decision and conditions in Europe influenced the Supreme Court to reconsider its position concerning mandatory flag salute regulations?

LESSON SIX

Case: *Tinker v. Des Moines Independent Community School District*, 1969 (393 U.S. 503; 89 S.Ct. 733).

Issue: Does the wearing of armbands as a form of political protest by students in a public school constitute a form of symbolic speech that is entitled to protection under the First Amendment's guarantee of freedom of speech?

Objectives: At the conclusion of the lesson students should be able to:

1. discuss the balance that should be maintained between liberty and order in a constitutional system;
2. compare the fundamental rights of students that the government should respect with the fundamental obligations that students should fulfill as citizens;
3. measure the reasonable limits that should be applied to freedom of speech in the school environment;
4. distinguish symbolic speech from verbal speech which is more common and traditional;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 6: BACKGROUND AND FACTS

The framers of the Constitution established a limited government that requires the consent of the people for its continued existence. To be known, consent and its necessary companion, dissent, must be expressed. On a practical level, peaceful social and political change would be virtually impossible were the government to suppress the right to express one's opinion in a reasonable manner. In *Palko* v. *Connecticut* (1937), Justice Cardozo recognized the need to guarantee a free exchange of ideas in a representative democracy when he described freedom of speech as "the matrix, the indispensable condition of nearly every other form of freedom."

Because the Framers envisioned a federal government limited to specific, enumerated powers they originally saw no need to protect freedom of speech in the Constitution. However, during the ratification process pressure from the citizens of various states for more pronounced restrictions upon the authority of this newly created central government culminated with the adoption of the Bill of Rights in 1791. Unfortunately, very little documentation exists pertaining to the debates in Congress and the state legislatures over the contents of the First Amendment. As a result, the original intent of the Framers of the Constitution and the Bill of Rights concerning freedom of speech is anything but clear.

Two years after the enactment of the Sedition Act of 1798 the citizens of the infant republic did demonstrate their affinity for freedom of expression. The law, largely the work of the Federalist Party, made "false, scandalous and malicious" criticism of the government a crime. Led by Presidential candidate Thomas Jefferson, the Democratic-Republicans charged that the Sedition Act was a tyrannical violation of the First Amendment, and in 1800 a majority of the voters agreed. Jefferson was elected President and the Democratic-Republicans took control of Congress for the first time.

The Sedition Act expired without ever being tested in the Supreme Court. The Court did not decide a freedom of speech case until 1919, over one hundred and thirty years after the Framers met in Philadelphia. In *Schenck* v. *United States* (1919), the Court upheld the constitutionality of the Espionage Act that was passed following the nation's entry into World War I in 1917. The Court's opinion, written by Justice Oliver Wendell Holmes, established a number of precedents that would be applied to the multitude of free speech cases that were to follow.

First, Justice Holmes presented a now famous illustration to clarify that freedom of speech is not absolute. He wrote:

> *The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.*

In addition to utterances that cause a public disturbance, other forms of speech commonly recognized to be outside the First Amendment's umbrella of protection include perjury, obscenity, fraud, slander, and criminal conspiracy.

Second, Holmes stated that "the character of every act depends upon the circumstances in which it is done." This observation foreshadowed the "time, place, and manner" restrictions upon speech that have consistently been regarded as reasonable. For example, words shouted at a football game could be quite inappropriate in a variety of other settings.

Finally, Holmes considered it proper for Congress to restrict speech that poses a "clear and present danger" to the nation. Other standards would eventually supplant the "clear and present danger" test, but more recently the Supreme Court has recognized the inadequacy of substantive tests in this area of constitutional interpretation. Statutes that are judged to be too vague, too broad, or simply too restrictive have failed to pass the scrutiny of the Supreme Court. Ironically, as the Court's view of the First Amendment has evolved over time it has been more receptive to the "marketplace of ideas" tenet advocated by Justice Holmes only months after his historic opinion in *Schenck*. In *Abrams* v. *United States* (1919), Holmes, writing in dissent, reasoned that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Further, Justice Holmes agrued that a "clear and present danger" exists only when speech is directly and immediately linked to specific acts that cause unlawful behavior that endangers the safety or security of persons or the society.

Freedom of speech, like all individual rights, has survived over two centuries of representative democracy—government by majority rule. The Constitution maintains a delicate balance that guards minority rights against the tyranny of a temporary majority.

During times of national emergency, the Supreme Court often faces difficult issues that test this delicate balance. At the height of World War II the Supreme Court reached a decision that is generally considered to be a turning point in the struggle to protect civil liberties.

In 1942, shortly after the attack on Pearl Harbor, the West Virginia Board of Education enacted a resolution that required public school students to salute the flag while reciting the Pledge of Allegiance. Only three years earlier the Supreme Court had found a similar regulation to be constitutional. In West Virginia the enactment was challenged by Jehovah's Witnesses, who considered the flag a graven image and, therefore, they objected to the flag salute on religious grounds.

In *West Virginia State Board of Education v. Barnette* (1943), in an unusually swift reversal of precedent, the Court found the flag salute requirement to be an unconstitutional violation of both the freedom of speech and freedom of religion guarantees found in the First Amendment. For Justice Jackson a "fixed star in our constitutional constellation" is the standard that the state cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

Approximately twenty-five years after the *Barnette* decision, the Supreme Court examined the impact that another war was having upon students in American classrooms. In August, 1964 two U.S. Navy destroyers reported that they had been attacked by North Vietnamese gunboats. Congress responded quickly and overwhelmingly by passing the Gulf of Tonkin Resolution. The bill gave President Lyndon Johnson the authority "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." Despite a campaign pledge to seek "no wider war", Johnson relied upon the Gulf of Tonkin Resolution to commit massive forces to Vietnam. By the end of 1965 the number of American soldiers stationed in Vietnam had escalated to nearly 200,000.

Domestically, the escalation of America's involvement in the Vietnam War meant that those who opposed the government's policy concerning Vietnam were becoming more numerous and more outspoken with each passing day. In December, 1965 a group of families in Des Moines, Iowa decided that they would show their support for a proposed truce and cease-fire in Vietnam during the Christmas season by wearing black armbands. A member of one of these families was Mary Beth Tinker, an eighth-grade student at Warren Harding Junior High School in Des Moines.

The principals of a number of public schools in Des Moines learned of the silent protest in advance and they met on December 14, 1965 to create a rule that prohibited the wearing of armbands in school. Students who violated this rule were to be suspended until compliance was demonstrated by no longer wearing an armband. Two days later Mary Beth Tinker wore an armband to school as planned and, after attending a few classes, she was suspended for refusing the principal's order to remove the armband.

Out of about 18,000 students in the Des Moines public school system only five were suspended for wearing armbands. The armbands elicited a few comments from fellow students but, otherwise, there had been no violence, no disruption of classes, and the schools continued to function in a very normal manner while the non-violent protest was in progress.

Nonetheless, on December 21, 1965 the school board met and voted to uphold the armband policy invoked by the principals despite a reminder from one of the suspended students who attended the meeting that a few students had worn armbands to mourn the killing of four black girls in 1963 when a bomb exploded in a church in Birmingham, Alabama. The school board members defended the principals' decision by reminding the public that a primary responsibility for any school official is to maintain order in the educational facility. The wearing of armbands, even when done in silence, was thereby classified as an organized demonstration that could potentially cause disorder within the school environment.

The school board's position was that America's participation in the Vietnam War was a volatile issue and the armbands could ignite disruptions that would threaten the safety and well-being of the student population. The board reasoned that emotions were running high due to the death of a nineteen-year-old paratrooper in Vietnam. He had recently graduated from a Des Moines high school and the news of his death had appeared in the local newspaper next to an article about the armband controversy.

The five students who had violated the school regulation returned to class without their armbands in January, following the holiday break. However, the dispute moved from the classroom to the courtroom. The American Civil Liberties Union, representing Mary Beth Tinker and the other students who had been suspended, challenged the constitutionality of the armband prohibition.

The ACLU cited a number of reasons why it considered the regulation to be a violation of freedom of speech. First, the ACLU lawyers were quick to point out that while armbands were prohibited, students had worn political campaign buttons and, even, the Iron Cross which is a German military symbol. Second, there was no evidence that the wearing of armbands by a few students had been significantly disruptive. Third, it was argued that even when done in complete silence the wearing of an armband as a form of protest constitutes "symbolic speech" which qualifies for protection under the First Amendment. Finally, it was important to clarify that even though the First Amendment originally applied only to the national government, in *Gitlow* v. *New York* (1925) the Supreme Court announced that state governments were equally prohibited from violating freedom of speech. This and other aspects of the incorporation doctrine are founded upon the principle that the liberty component of the Fourteenth Amendment's due process clause safeguards many of the provisions found in the Bill of Rights from incursions by the states. Iowa had control over the public schools within the state and the Des Moines School Board was therefore acting as an agent of the state government when it banned the armbands. On appeal, the dispute eventually reached the United States Supreme Court.

LESSON 6: DECISION

Mary Beth Tinker wore an armband to protest America's military involvement in Vietnam on December 16, 1965. By the time the Supreme Court decided *Tinker v. Des Moines Independent Community School District* on February 24, 1969 a great deal had changed. Opinion polls showed that a majority of Americans opposed the nation's presence in Vietnam. Two of the leading voices of the anti-war movement, Martin Luther King, Jr. and Robert Kennedy, had been assassinated. President Johnson chose not to run for re-election in 1968 primarily due to the unpopularity of the Vietnam War. Richard Nixon was elected President that year claiming he had a "secret plan" to resolve the nation's military commitment to South Vietnam. The plan was still a secret in 1972 when Nixon was re-elected, since American troops were still stationed in Vietnam at that time.

The *Tinker* case proved to be the last major freedom of expression case decided by the legendary Warren Court. The case itself presented a classic confrontation between liberty and order. Somehow the Court had to balance the students' desire to express their political beliefs with the school officials' legitimate concern for maintaining order in the schools.

By a 7-2 vote, the Supreme Court ruled that the armband regulation was an unconstitutional violation of freedom of speech. The majority opinion was written by Justice Abe Fortas. His words were reminiscent of Justice Jackson's reasoning in the 1943 flag salute decision. Fortas was emphatic when he wrote:

> *In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.*

The Court established an important precedent when it recognized the wearing of an armband as a "symbolic act" that is "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." Symbolic speech is expression that conveys a message without utilizing the spoken word. Justice Fortas asserted that students can legitimately express their opinions because they do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Fortas, in writing the opinion for the Court, was strongly influenced by the fact that "the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance." He specifically referred to campaign buttons and Nazi symbols.

Justice Fortas was equally influenced by the fact that there was "no indication that the work of the schools or any class was disrupted." He rejected the school board's contention that it was reasonable to expect the armbands to incite a disturbance. Fortas wrote:

> *[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.*

On the other hand, Fortas recognized that liberty must be balanced by a sufficient amount of order. The Court acknowledged "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards to prescribe and control conduct in the schools." In this regard, there is justification for prohibiting conduct that materially or substantially interferes with the need to maintain an appropriate level of discipline in schools. Fortas reasoned:

> *But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.*

Justice Hugo Black, traditionally a strong supporter of free speech, wrote a vigorous dissenting opinion in the *Tinker* case. Public schools, according to the dictates of federalism, are administered by the governments of the various states. Black thus questioned whether it is proper for the federal judiciary to "allocate to themselves the function of deciding how the pupils' school day will be spent."

Black essentially agreed with the school authorities that the wearing of an armband could be a disruptive factor in the school environment. He wrote:

> *I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, this is, took the students' minds off their classwork and diverted them to thoughts about the highly emotionally subject of the Vietnam War.*

Black was not optimistic about the impact that he foresaw the *Tinker* decision would have upon the nation. Black predicted "the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary." Concerning the balance between liberty and order, Black warned that "uncontrollable liberty is an enemy of domestic peace." Black bemoaned the fate of America's public schools because, in his eyes, "groups of students all over the land are already running lose, conducting break-ins, sit-ins, lie-ins, and smash-ins." After the Court's holding in *Tinker*, Black further warned that "students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders." Further, Justice Black wrote:

> *This case, therefore, wholly without constitutional reasons in my judgement, subjects all public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest students.*

LESSON 6: FOLLOW-UP DISCUSSION QUESTIONS

1. The Court's opinion stated that students not only possess fundamental rights, but that they also face fundamental obligations as citizens. What are the basic obligations that citizenship places upon students?

2. Do you agree with the assertion that students do not "shed their constitutional rights to freedom of speech and expression at the schoolhouse gate" which was made by Justice Fortas? Why or why not?

3. What types of expression should be allowed in school? What should be prohibited? If one student can wear an armband should other students be allowed to wear campaign buttons or swastikas? Should the hoods and robes worn by members of the Ku Klux Klan be permitted in schools?

4. Was it reasonable for school authorities to fear that armbands could produce violence when the nation is involved in a war? If a student wearing an armband was the target of a verbal or a physical assault would an armband prohibition be justified? What is meant by a "heckler's veto?"

5. Why is it important to protect minority rights from the "tyranny of the majority?"

6. Since authority over public schools is one of the powers reserved to the individual states, was it proper for the Supreme Court to ultimately decide an issue that originated in the public schools of Des Moines, Iowa?

7. Justice Black predicted that the Tinker decision would signal "the beginning of a new revolutionary era of permissiveness in American schools." Was he correct?

LESSON SEVEN

Case : *Bethel School District No. 403 v. Fraser*, 1986 (478 U.S. 675; 106 S.Ct. 3159).

Issue: Do public school officials violate the principle of freedom of speech when a student is disciplined for indecent speech?

Objectives: At the conclusion of the lesson students should be able to:

1. discuss whether or not school authorities should be able to prohibit indecent speech even though no obscene or vulgar words are used;
2. determine if school officials should have more authority over student speech than the First Amendment allows the government to exercise over citizens in other settings;
3. discuss whether or not offensive speech violates the rights of student listeners attending a school assembly;
4. examine the constitutionality of school speech codes;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 7: BACKGROUND AND FACTS

Justice Fortas, in *Tinker v. Des Moines Independent Community School District* (1969), made a lasting impression when he wrote that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, it should be remembered that in this opinion the Court also announced that behavior is not protected by the First Amendment whenever it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

The First Amendment, if taken literally, would appear to ban any governmental regulations on speech. The amendment states that there can be "no law ... abridging the freedom of speech." This is much more definitive than allowing searches which are not "unreasonable" or punishment which is not "cruel and unusual." Those who advocate absolutism contend that when it comes to speech, "no law" means any regulation by the government is a violation of the First Amendment.

Ironically, Justice Hugo Black, who wrote a scorching dissent in *Tinker*, was one of the few members of the Supreme Court to ever express the absolutist point of view. In *Konigsberg v. State Bar of California* (1961), a dissenting Justice Black wrote that "the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."

The "balancing" which Black refers to is the common alternative to absolutism. A balance is necessary in a society that attempts to maintain both liberty and order. Writing for the majority in *Konigsberg*, Justice Harlan reasoned that "constitutionally protected freedom of speech is narrower than an unlimited license to talk" simply because "certain forms of speech, or speech in certain contexts" can fall outside the umbrella of First Amendment protection. Justice Holmes essentially promoted this idea in the Supreme Court's first major consideration of freedom of speech, *Schenck v. United States* (1919), when he observed that even "stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."

A Supreme Court majority has never sanctioned the position that freedom of speech is absolute. However, in *Murdock v. Pennsylvania* (1943), the Court did announce that freedom of speech is in a "preferred position" when compared to other guarantees contained in the Constitution. In a representative democracy open debate is a necessity which makes it vital to protect minority viewpoints from the will of a temporary majority. As Justice Holmes wrote, in his dissent in *United States v. Schwimmer* (1929), open debate requires "freedom for the thought that we hate."

Few would argue that the First Amendment protects perjury or criminal conspiracy simply because they are forms of expression. In *Chaplinsky v. New Hampshire* (1942), the Supreme Court also found "fighting words" to be outside the scope of First Amendment protection. During the course of an arrest Walter Chaplinsky called a police officer a "damned fascist and a God damn racketeer." He was subsequently convicted of violating a statute that prohibited "any offensive, derisive, or annoying word to any other person who is lawfully in the street." In upholding the constitutionality of the statute the Court found that there are a few, specific categories of speech not worthy of protection. According to Justice Murphy, such speech includes "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Balance is again the key as any benefit that might be derived from fighting words, or any of the other forms of unprotected speech, "is clearly outweighed by the social interest in order and morality." The test is whether or not the words would provoke a reasonable man of "common intelligence" to retaliate.

In *Chaplinsky*, Justice Murphy stated that "lewd and obscene" speech should also be excluded from protection under the First Amendment. However, similar to the debate over what actually constitutes fighting words, it has been difficult to define obscenity. In *Roth v. United States* (1957) the Court adopted the logic utilized in *Chaplinsky* and stated that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." The appropriate test was "whether to the average person, applying contemporary community standards, the dominant theme taken as a whole appeals to prurient interest."

In *Miller v. California* (1973), the Court reaffirmed the "average person" and "community standards" guidelines established in *Roth* while adding that obscenity "depicts or describes, in a patently offensive way, sexual conduct", and that the material in question must lack "serious literary, artistic, political or scientific value." Using *Chaplinsky, Roth*, and *Miller* as precedents, the Supreme Court has consistently held that as difficult as it may be to define and identify, obscenity is not within the area of constitutionally protected speech.

On a few occasions the Supreme Court has addressed the need to shield minors from obscene material. In *Ginsberg* v. *New York* (1968), the Court upheld the constitutionality of a state statute that prohibited the sale of sexually explicit printed materials to minors, even though the material would not be considered obscene for adults. In *Erznoznik* v. *Jacksonville* (1975), the Court reaffirmed that the First Amendment rights of minors are not coextensive with the rights of adults, but that "minors are entitled to a significant measure of First Amendment protection."

In *Federal Communications Commission* v. *Pacifica Foundation* (1978), the Court upheld the government's authority to prohibit radio broadcasts which it finds "indecent but not obscene." The dispute originated with the broadcast of a monologue by comedian George Carlin titled "Filthy Words" and the Court ruled that speech otherwise protected can be regulated to protect the welfare of children.

On April 26, 1983 Matthew Fraser, a senior at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student government. The school assembly was attended by approximately 600 students, ranging in age from 14 to 18, and attendance was voluntary to the extent that students had the option of reporting to study hall.

During his speech Fraser used graphic sexual metaphors to urge students to vote for Jeff Kuhlman, one of the candidates. In part, Fraser said:

> *I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most ... of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you.*

According to school officials, some of the students hooted and yelled during the speech, some mimicked the sexual activities alluded to in the speech, while others appeared to be embarrassed or bewildered. Prior to the assembly, Fraser had discussed the contents of the speech with two teachers and he had been advised that it was inappropriate and probably should not be delivered. He was also advised that if he delivered the speech that there could be "severe consequences."

The day after the assembly the Assistant Principal informed Fraser that he had violated the school's "disruptive conduct rule." This rule stated that "conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." After he admitted that he deliberately used sexual innuendo in the speech, Fraser was suspended for three days and his name was removed from a list of candidates eligible to speak at graduation exercises. Fraser appealed the Assistant Principal's decision through the school system's disciplinary system, but the hearing officer essentially affirmed the decision by simply reducing the suspension from three to two days. Fraser thereupon filed a lawsuit in the federal court system alleging that his freedom of speech had been violated.

Fraser argued that the *Tinker* case established the precedent that students are "persons" within the framework of the Constitution. The due process clause of the Fourteenth Amendment incorporates many of the liberties contained in the Bill of Rights, including freedom of speech, and protects these individual liberties from incursions by a state. Fraser's primary contention was that the school's disruptive conduct rule was unconstitutionally vague and overly broad. On the other hand, lawyers representing the school system argued that Fraser's speech was indecent, lewd, and offensive to the audience of students and faculty. Both the Assistant Principal and the hearing officer found the sexual metaphors in the speech to be obscene within the parameters established by the school regulation. The penalty was therefore defended as being reasonable and appropriate. When the dispute eventually reached the Supreme Court the school system also reminded the justices that even under *Tinker* behavior that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" was viewed as conduct outside the protection of the First Amendment.

LESSON 7: DECISION

In *Bethel School District No. 403 v. Fraser* (1986), the United States Supreme Court ruled that a public school regulation designed to limit obscene or vulgar speech that could disrupt the educational process is not a violation of freedom of speech. The vote was 7-2, and the majority opinion was written by Chief Justice Warren Burger. The Court studied the circumstances surrounding Matthew Fraser's speech and concluded that school officials have a legitimate interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school. Burger's opinion indicated that the Court majority was heavily influenced by the fact that many of the students who heard Fraser's speech were 14-year-olds.

Chief Justice Burger was quick to point out that the Court's holding in *Bethel* was not a contradiction of the dictum announced in *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." He observed a "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech" in *Bethel*. Additionally, the symbolic speech in *Tinker* was "a nondisruptive, passive expression of a political viewpoint" that did not intrude "upon the work of the schools or the rights of other students." On the other hand, the Court held that the First Amendment does not require a school to tolerate student speech that is inconsistent with its "basic educational mission", even though the government could not censor similar speech outside the school environment.

In *Bethel*, Burger was searching for the proper balance between the student's right of expression and the school's responsibility to maintain an orderly environment that is conducive to learning. The Chief Justice argued that public schools have a fundamental responsibility to prepare students for responsible citizenship. Burger wrote:

> *The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.*

Burger paid homage to the Court's ruling in *Tinker*, but he argued that simply because students qualify as "persons" under the Constitution, First Amendment rights of students are not automatically coextensive with the rights of adults in other settings. Burger, after noting wide freedom in matters of adult public discourse, reasoned:

> *It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.*

It was not the political content of Fraser's speech that the school authorities were attempting to censor. Burger argued that it was the "pervasive sexual innuendo" of Fraser's speech that was offensive to both teachers and students. Concerning who should have the authority to distinguish appropriate from inappropriate forms of expression in the school environment, Burger held that the determination "properly rests with the school board." Further, it is "highly appropriate" for school officials to prohibit the use of offensive speech at school-sponsored events. Students are not required to leave their constitutional rights at the schoolhouse gate, but, as a result of the Supreme Court's decision in *Bethel School District No. 403 v. Fraser*, free speech does not hold the same meaning for children in public schools that it does for adults in the general community.

In a brief dissent, Justice Marshall recalled that a crucial factor in the *Tinker* case was the school district's failure to demonstrate that the armbands were significantly disruptive of the educational process. Similarly, in *Bethel*, Marshall disagreed with the majority's contention that "respondent's remarks were indeed disruptive."

In a longer dissent, Justice Stevens agreed with the majority that "a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission." However, Stevens argued that before a student is punished for using offensive speech, "he is entitled to fair notice of the scope of the prohibition and the consequences of its violation." For Stevens the regulation was simply too vague to merit enforcement under the First Amendment's guarantee of freedom of speech. Stevens highlighted the apparent vagueness of the school regulation by asserting that the speech was not "conduct." Stevens admitted that the speech contained a sexual metaphor, but the actual words were not "obscene" or "profane."

Justice Stevens also recalled that the precedent established in *Roth* and reaffirmed in *Miller* for identifying obscenity was to be "contemporary community standards." Stevens questioned whether or not Supreme Court justices, "a group of judges who are at least two generations and 3,000 miles away from the scene of the crime", are in a position to determine what constitutes obscenity in a high school assembly.

Finally, Stevens looked closely at the circumstances surrounding Matthew Fraser's speech and, like Justice Marshall, he concluded that the evidence did not demonstrate that the speech had a materially disruptive effect upon the educational process.

LESSON 7: FOLLOW-UP DISCUSSION QUESTIONS

1. Did the *Bethel* decision "overturn" the pronouncement in *Tinker* that students do not leave their constitutional rights "at the schoolhouse gate"? Should public school officials have the "latitude" to restrict the rights of students that does not exist outside the school environment?

2. Was the disruptive conduct rule that was used to discipline Matthew Fraser so vague or so broad in scope that it could be used to restrict speech that should be allowed? Do you agree with the intent and content of this rule?

3. Should students be involved in setting the criteria for what constitutes unacceptable speech in school, or should this matter be decided exclusively by school officials?

4. Do you agree with Chief Justice Burger's assertion that the disciplinary action in this case was proper because schools must teach students "the boundaries of socially appropriate behavior"?

5. Justice Marshall and Justice Stevens both questioned whether or not the speech was actually disruptive. What is your opinion?

6. Did Fraser violate the rights of other students by making a speech which he admitted contained sexual innuendo? Was the speech obscene?

7. Do public schools need speech codes to prohibit any speech that insults, degrades, or stereotypes individuals? Would such codes be constitutional? Would these types of codes be enforceable?

LESSON EIGHT

Case: *Hazelwood School District v. Kuhlmeier*, 1988 (484 U.S. 260; 108 S.Ct. 562).

Issue: Does the First Amendment's guarantee of freedom of the press protect students writing for school-sponsored publications, such as a school newspaper, from censorship by school officials?

Objectives: At the conclusion of the lesson students should be able to:

1. Discuss the importance of protecting freedom of the press in a representative democracy;
2. recognize that freedom of the press is not absolute and identify acceptable limits placed upon the press;
3. examine whether or not a school-sponsored newspaper is a "public forum" fully protected by the First Amendment
4. consider the reasons for publishing a student newspaper and the reasonable limits on student expression;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 8: BACKGROUND AND FACTS

In addition to protecting freedom of speech, the First Amendment also safeguards freedom of the press, the right to assemble, and the right to petition the government. These various modes of communication are sometimes merged under the composite heading "freedom of expression." However, freedom of the press has held a distinctive place in the evolution of American history.

In 1787 Thomas Jefferson stated that if he had to choose between "a government without newspapers or newspapers without a government" he would "not hesitate for a moment to prefer the latter." This may have been an overstatement on Jefferson's part, but, in general, the Founding Fathers recognized that an informed citizenry would be vital for the survival of free government, a representative democracy. The Supreme Court echoed this opinion in *Murdock v. Pennsylvania* (1943) when it expressly stated that "freedom of the press, freedom of speech, freedom of religion are in a preferred position" in the hierarchy of constitutional values.

The term "press" itself has been an evolving concept. Originally it referred to the products of the printing press, including books, newspapers, pamphlets, and periodicals. Today, the electronic media are also protected by freedom of the press. This protection includes preventing what is known as prior restraint—efforts by the government to prohibit the dissemination of information from ever taking place.

Until 1694 English authors and publishers had to contend with an elaborate system of government licensing prior to publication. By the time of the American Revolution this type of censorship, or prior restraint, no longer existed in the colonies, but the law of seditious libel was still very much in use. Between 1760 and 1776 there were approximately fifty convictions under this law which essentially made it a crime to criticize the government or its officials. Unlike prior restraints which prevented publication, seditious libel was an accusation made after the questionable material was published.

Ironically, a number of the Framers of the Constitution were involved with the enactment of the infamous Sedition Act of 1798, which made it a federal crime to write or publish "any false, scandalous, and malicious writing" about the government. In their defense, scholars generally agree that the First Amendment was not designed to prevent prosecutions for seditious libel. On the other hand, the legislation proved to be a political disaster for the Federalist Party which dominated Congress. Citizens saw the law as an act of repression and, indeed, the ten publishers convicted for violating the Sedition Act were all Jeffersonian Republicans. In 1800 the Federalists lost control of Congress and Jefferson defeated the incumbent Federalist President, John Adams. The Sedition Act expired before the Supreme Court could rule on its constitutionality.

The Supreme Court did uphold the constitutionality of the Espionage Act of 1917 in *Schenck v. United States* (1919). The Act itself was a response to America's entry into World War I, and the Court ruled that resistance to the war effort posed a "clear and present danger" to the security of the nation. In *Gitlow v. New York* (1925) the Supreme Court upheld the constitutionality of a state law that prohibited individuals from advocating the violent overthrow of the government. The *Gitlow* decision did establish an important precedent within the framework of the incorporation doctrine. The Court reasoned that the due process clause of the Fourteenth Amendment requires states to respect freedom of speech and freedom of the press in the same manner that the First Amendment originally mandated the respect of the federal government in these two areas.

The Supreme Court did not directly face the issue of prior restraint until 1931. In 1925 Minnesota enacted its Public Nuisance Law which authorized the imposition of a permanent injunction against anyone found guilty of publishing " a malicious, scandalous and defamatory newspaper." In 1927 *The Saturday Press*, published by Jay Near, charged that law enforcement officers were willfully ignoring "a Jewish gangster" who controlled gambling and other criminal activity in Minneapolis. The principle target of Near's accusations was Floyd Olson, the county attorney who would later serve three terms as governor in Minnesota. Olson convinced a state court to invoke Minnesota's so-called Gag Law by issuing a permanent injunction to prevent Near from publishing *The Saturday Press*.

In *Near v. Minnesota* (1931) the Supreme Court ruled that the permanent injunction constituted a prior restraint which is not permissible under the First Amendment. Publishers are not immune from civil and criminal punishments after the fact, but Chief

Justice Hughes concluded that the "chief purpose" of the First Amendment's freedom of the press provision is "to prevent previous restraints upon publication." However, the Court did not endorse an absolute ban on prior restraints by the government. Hughes considered the issue of national security during times of war, for example, and he reasoned that the government could prevent "the publication of the sailing dates of troops and transports or the number and location of troops."

In 1971, four decades after Chief Justice Hughes considered the intersection of national security and prior restraint, the *New York Times* initiated a series of articles that would require the Supreme Court to settle just such a dispute. Daniel Ellsberg, a former consultant for the Defense Department, provided the newspaper with a classified government study of America's lengthy involvement in Vietnam. The documents came to be known as the Pentagon Papers, and after a few installments were published the government sought a court order to stop the *New York Times* from continuing the series.

New York Times v. United States (1971) resulted in a 6-3 vote and a per curiam opinion that rejected the government's contention that the Pentagon Papers posed a "grave and immediate danger to the security of the United States." The Court weighed the government's argument and determined that it had not met "the heavy burden of showing justification for the imposition of such a restraint." The decision reaffirmed the *Near* precedent that prior restraints will be tolerated only when a sufficiently compelling reason is demonstrated by the government.

The Supreme Court, in *Tinker v. Des Moines Independent Community School District* (1969), established that public school students, as "persons" under the Constitution, are protected by the First Amendment. However, public school officials were simultaneously allowed the flexibility to limit student expression that would substantially disrupt the operation of the school or interfere with the rights of others. In 1988 the Court examined the degree to which students writing for a school newspaper are protected by the freedom of the press standard which is enumerated in the First Amendment.

The controversy began in 1983 when Robert E. Reynolds, the Principal of Hazelwood East High School in St. Louis County, Missouri, deleted two pages from *Spectrum*, the school newspaper. The student paper was written and edited by the Journalism II class at the high school. The school board allocated funds annually for the printing of the newspaper and these funds were supplemented by the proceeds from sales of the newspaper. For the 1982-83 school year the cost of printing the paper totaled $4,668.50 while $1,166.84 was raised through the sale of the *Spectrum* to students and other members of the school community. The school board also covered other costs associated with producing the newspaper, including supplies, textbooks, and a portion of the teacher's salary.

The individual who taught the Journalism II course for most of the 1982-1983 academic year resigned on April 29, 1983 to take another job. Howard Emerson assumed the role of newspaper adviser for the remainder of the semester. The May 13th edition of the *Spectrum* was nearing completion when Emerson was appointed to this position. On May 10th Emerson submitted the page proofs for the May 13th edition to Principal Reynolds for his review. This was a normal operating procedure at Hazelwood East High School.

Reynolds objected to two articles that were scheduled to appear in the newspaper. One described the experiences of three students who were pregnant, and the other examined the impact of divorce upon students at the high school. The principal felt that privacy was an important issue raised by both of the articles. He objected to the story on pregnancy because he feared that the girls quoted in the article could be easily identified even though their names had been omitted. Reynolds also considered the references to sexual activity to be unsuitable for the high school's younger students.

The principal found the story on divorce objectionable because it contained comments from a named student about the behavior of her father. Reynolds thought that the parents should have been provided with an opportunity to either respond to these remarks or to consent to their inclusion in the article. The principal was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that the time was not available to make the necessary changes in the articles before the scheduled press run. Any significant delay could prevent the newspaper from appearing before the end of the school year. Reynolds therefore ordered that the two pages containing the articles he considered objectionable be deleted, even though this would result in the omission of other, acceptable stories. The year's final edition of Spectrum was published as a four-page newspaper rather than the six-page version that had been planned.

The students who wrote the articles and edited the newspaper were not consulted by the principal or the faculty adviser about the two pages that had been deleted from the newspaper. Cathy Kuhlmeier and two other students from the newspaper staff filed a lawsuit contending that their First Amendment rights to freedom of speech and freedom of the press had been violated after they learned exactly what had taken place without their knowledge or consent.

Legal counsel for the students argued that the censorship was not justified because neither of the articles was likely to materially disrupt classwork or cause disorder in the school. The article on pregnancy, for example, did contain references to sexual activity and birth control, but there was no sexually explicit material in the article.

Much of the students' case hinged upon their contention that the newspaper was intended to serve the school community as a conduit for student viewpoints and opinions. In this capacity, they argued, the student paper was a "public forum" and censorship was not justified absent substantial evidence that order and discipline were in jeopardy.

On the other hand, the school officials argued that the student newspaper was a part of the high school curriculum that was dependent upon the school system for financial support and faculty guidance. The paper, therefore, carried the imprimatur of the school district and any material that the principal legitimately considered in conflict with the school's basic educational mission was subject to reasonable supervision. Given the circumstances, it was argued, the censorship was reasonable. It was unfortunate that a number of acceptable articles were lost in the process, but time was a factor and Principal Reynolds acted in a manner that both he and the school board considered responsible and appropriate.

LESSON 8: DECISION

The Supreme Court in *Hazelwood School District v. Kuhlmeier* (1988), by a vote of 5-3, concluded that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." The majority opinion was written by Justice Byron White.

Justice White opened his opinion by quoting the famous line from the *Tinker* decision that students do not leave their constitutional rights "at the schoolhouse gate." However, White went on to emphasize that the *Hazelwood* case required a different standard than the one applied in *Tinker*.

He wrote:

> *The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in* **Tinker***—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.*

The Court relied heavily upon its decision in *Bethel School District No. 403 v. Fraser* (1986), and it reaffirmed that the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings." The content-based restrictions that the Court found permissible in *Hazelwood* would have been unconstitutional if applied by the government to a privately owned publication outside the school environment. Justice White reasoned that public schools are not required to tolerate student speech that is inconsistent with its "basic educational mission."

The Court articulated that a school facility can only be considered a "public forum" if school officials have opened that facility "for indiscriminate use by the general public." The student newspaper at Hazelwood East High School was seen as a part of the curriculum intended to teach the basics of journalism and, as a result, not a public forum. This distinction led the Court to the conclusion that "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."

The Court also concluded that the decision by Principal Reynolds to delete the two articles he found inappropriate and the manner in which he accomplished this objective were both reasonable. Justice White reasoned that "a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics." The students had not included graphic accounts of sexual activity in their articles. Nonetheless, Justice White concluded:

> *It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14 year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.*

Ironically, Justice White, who voted with the majority in *Tinker*, echoed Justice Black's volatile dissent in that case. Black warned that the Constitution does not require "surrendering" control of the public schools to the students. In *Hazelwood*, White similarly concluded that the "decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity."

Justice William Brennan's dissenting opinion fully supported the *Tinker* decision that had been rendered almost two decades earlier. Brennan presented a policy statement issued annually by the school board which guaranteed student publications "will not restrict free expression or diverse viewpoints within the rules of responsible journalism." In Brennan's opinion, much more was at stake. He wrote:

> *In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.*

Justice Brennan challenged the distinction drawn in Justice White's majority opinion between symbols like armbands used by students to express a personal opinion of a political nature, and expression in a school-sponsored publication that bears the imprimatur of the school system. Brennan, stressing the Court never "intimated a distinction between personal and school-sponsored speech", argued that the Court in *Hazelwood* was negating the *Tinker* precedent buy creating categories of student speech to sanction censorship. Brennan found no fundamental difference between Mary Beth Tinker's armband and words written for a school newspaper by Cathy Kuhlmeier.

The Court in *Tinker* struck a "balance" and Brennan asserted that, as a result, "public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate." Unwarranted censorship by school authorities, when student expression does not materially disrupt classwork, creates an imbalance contrary to Brennan's reading of *Tinker*.

Justice Brennan recognized that educators have an undeniable "mandate to inculcate moral and political values", but this does not justify "a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position."

In the end, Justice Brennan could find but one justification for the Court's distinction between sponsored and non-sponsored student expression—the risk that the views of the individual speaker could erroneously be attributed to the school. However, Brennan offered a practical solution for this potential problem. School-sponsored publications could include a disclaimer that opinions expressed by students do not necessarily reflect the viewpoints of the school system or its employees. Brennan was troubled by the "brutal censorship" practiced by the principal and the school system's reluctance to pursue "less oppressive alternatives." He also feared that the *Hazelwood* decision, rather than teaching children to "respect the diversity of ideas that is fundamental to the American system", would instead encourage youth to "discount important principles of our government as mere platitudes."

LESSON 8: FOLLOW-UP DISCUSSION QUESTIONS

1. Why is it important to maintain freedom of the press in a representative democracy?

2. Did the actions taken by Principal Reynolds constitute prior restraint? When is prior restraint or censorship by the government justified?

3. What distinction did Justice White make between the student expression considered by the Supreme Court in *Tinker* and the expression considered in *Hazelwood*? Do you agree with his conclusion that the *Tinker* precedent was fundamentally inapplicable in the *Hazelwood* case?

4. Justice Brennan, in his dissent, suggested the use of a disclaimer to clarify that student opinions were not necessarily the official positions of the school system. Would such a disclaimer solve the problem presented in this case?

5. Do you think that the decision in *Hazelwood* provides school officials with too much editorial control over student publications? Is such control necessary?

6. Is a school-sponsored student newspaper a "public forum" or is it simply a a part of the school's curriculum? Can it be both?

7. Is the *Hazelwood* decision a signal that student are considered to be irresponsible? What is the purpose for publishing a student newspaper? How much control should student editors have over the contents of the paper?

IV

DUE PROCESS AND OTHER RIGHTS OF THE ACCUSED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

—Fourth Amendment to the Constitution
of the United States of America

No person shall be ... deprived of life, liberty, or property, without due process of law. ...

—Fifth Amendment to the Constitution
of the United States of America

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

—Eighth Amendment to the Constitution
of the United States of America

Lessons on Supreme Court Cases:

Lesson 9 - *In re Gault* (1967)
Lesson 10 - *Goss* v. *Lopez* (1975)
Lesson 11 - *Ingraham* v. *Wright* (1977)
Lesson 12 - *New Jersey* v. *T.L.O.* (1985)

LESSON NINE

Case: *In re Gault*, 1967 (387 U.S. 1; 87 S.Ct. 1428).

Issue: Should a juvenile court be required to follow due process standards that were established for adult proceedings?

Objectives: At the conclusion of the lesson students should be able to:

1. define what is meant by due process of law and distinguish substantive due process from procedural due process;
2. examine the reasons for the development of a separate juvenile justice system in the United States;
3. discuss whether or not juvenile courts should emphasize rehabilitation over punishment;
4. consider whether or not strict procedural due process regulations should be applied to juvenile court proceedings;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 9: BACKGROUND AND FACTS

The Fifth Amendment to the United States Constitution declares that no person shall be "deprived of life, liberty, or property, without due process of law." When the Fourteenth Amendment was ratified in 1868 the due process standard was applied to individual states. Legal scholars trace the origin of this concept to the Magna Carta that was signed by King John in 1215. This English document, an enduring symbol of limited government, stated that a prosecution by the government must be conducted according to the "law of the land."

The essence of due process is fairness. Life, liberty, and property have traditionally been considered natural rights and, according to social contract theory, the best way to protect these essential rights is by creating a government that derives its power from the consent of the governed. In the American tradition the Declaration of Independence stands as a lasting testament to the natural rights philosophy. The rights which were called "unalienable" by Thomas Jefferson can be limited to preserve order in society, but limitations must be contained in fair laws that are administered in a fair manner.

The tenet that the substance or content of a law must exhibit fairness is known as substantive due process. During the Vietnam era, for example, some Americans argued that it was essentially unfair that a citizen could be drafted into the military at the age of eighteen, but that same person was considered to be too young to vote in national elections. In 1971 the Twenty-Sixth Amendment eradicated this inconsistency. In general, unwarranted discrimination by the government contradicts the principle of substantive due process.

The procedures employed by the government to impose criminal sanctions upon an individual must also be fair. This standard is known as procedural due process. The Bill of Rights contains numerous protections to guard the rights of a citizen during criminal proceedings. For example, the Fourth Amendment prohibits unreasonable searches and seizures, while the Fifth Amendment protects individuals from self-incrimination and double jeopardy. The Sixth Amendment guarantees a speedy and public trial, notification of charges, the right to confront witnesses, and the right to legal counsel. The Eighth Amendment prohibits the imposition of excessive bail or cruel and unusual punishment.

By a process known as selective incorporation most of the safeguards contained in the Bill of Rights, which was designed to limit the power of the national government, have been applied to the various states. The Supreme Court has extended these protections by invoking the "liberty" component of the Fourteenth Amendment's due process clause. In *Mapp* v. *Ohio* (1961), for example, the use of evidence obtained as the result of an illegal search was prohibited in state courts. In another Supreme Court case, *Gideon* v. *Wainwright* (1963), the right to counsel was guaranteed in state court proceedings.

For centuries jurists have struggled to develop fair procedures to handle juvenile offenders. During America's colonial period established English common law required that children, age seven and older, were to be tried in the same courts and imprisoned in the same institutions as adults. However, by the 1800's progressive jurists and community activists began calling for reforms. They argued that a child forced to serve a harsh sentence alongside adult criminals was destined to continue a life of crime. As an alternative it was suggested that a delinquent child could be reformed as the result of proper guidance and supervision.

In 1899 Illinois established the nation's first separate juvenile court system. During the next two decades virtually every other state followed suit by establishing juvenile justice systems that were both paternalistic and nonadversarial. Juvenile courts were designed to incorporate a policy known as "parens patriae," meaning that the state has a responsibility to care for those who are not fully able to care for themselves, including children. Rather than punishment, the goal was treatment and rehabilitation. Informality and flexibility were stressed in an effort to provide young offenders with an opportunity to start anew without the handicap of a criminal record or the adverse publicity that often surrounds a public trial. Separate correctional facilities for juveniles were established to put these ideas into practice.

In 1966, in *Kent* v. *United States*, the Supreme Court was said to have "constitutionalized" the nation's juvenile justice system by recognizing the validity of separate juvenile courts. In this particular case the court ruled that a juvenile court could not waive its jurisdiction to authorize the prosecution of a minor in an adult criminal court without first holding a formal hearing that met accepted due process standards. The following year the Supreme Court would render a decision that would have a profound and lasting impact on the juvenile justice system in the United States.

On June 8, 1964 fifteen-year-old Gerald Gault was taken into custody by the sheriff in Gila County, Arizona for a relatively minor offense. Gerald and a friend, Ronald Lewis, were accused of having made an obscene phone call. The complaint was made by a neighbor of the two boys, Mrs. Cook. Gerald's parents were both at work when he was arrested. However, no steps were taken to advise them that their son had been taken into custody. Gerald's older brother was sent to look for him that evening and, after a visit to the home of the Lewis family, he informed his mother that Gerald had been taken into custody. Mrs. Gault went to the detention center where her son was being held, and she learned from a probation officer that a juvenile court hearing was scheduled for the next day to determine Gerald's fate.

At the time Gerald was serving probation as a result of having been in the company of another boy who had stolen a wallet from a lady's purse. At the preliminary hearing on June 9th Gerald was not represented by an attorney, and neither he nor his parents were informed of his right to legal counsel. The complainant, Gault's neighbor, did not attend the hearing. Gerald's mother requested the attendance of Mrs. Cook to clarify which boy had spoken the obscene remarks, but the judge denied her request. Gerald would later claim that at this meeting he admitted only to having dialed the phone number, and that his friend had made the indecent remarks. The judge testified on a later date that Gerald also admitted to having made a lewd statement over the phone. Unfortunately, there was no transcript of the hearing to substantiate either contention.

On June 15, 1964 the juvenile court judge cited Gault's probationary status and declared him a juvenile delinquent. Therefore, as a result of the obscene phone call, Gerald Gault was sentenced to the state's industrial school for the remaining period of his minority, which would not expire until the age of twenty-one. If Gault had been an adult the maximum penalty for this particular offense would have been a fine of fifty dollars or two months in jail. Instead, Gerald was facing a six-year sentence. Also, Arizona law did not permit an appeal from a juvenile delinquency decision.

Gerald's parents did exercise the one option that was left open when they filed for a writ of habeas corpus. This type of writ requires the state to show just cause for an individual's arrest and detention. It was alleged that Gerald's incarceration constituted a deprivation of liberty without due process of law. The Fourteenth Amendment protects individuals from such violations by a state. Specifically, Gault's suit cited alleged violations of six commonly recognized due process provisions: notification of charges, the right to counsel, the right to confront and cross-examine an adverse witness, the privilege against self-incrimination, the right to a transcript of the proceedings, and the right to an appellate review.

Before the Supreme Court of Arizona, representatives of the state argued that two hearings were held and the state's due process requirements for juvenile proceedings had been satisfied. The state also maintained that the services of an attorney could have been secured by the Gault family. In this regard it was argued that in a juvenile hearing the judge is obligated to determine what course of action will best serve the needs of the particular child. In Gault's case, a probation officer was also present at the hearings to assist in this capacity. The need for confidentiality was stated as the reason for not offering an opportunity to appeal the findings of the juvenile court. Concerning Gerald, it was asserted that he admitted to having participated in the offense, and he was on probation at the time.

After the Supreme Court of Arizona dismissed the petition for a writ of habeas corpus, the case reached the U.S. Supreme Court on appeal. A number of additional points were made before the Supreme Court. It was argued that informality and flexibility are necessary components of the juvenile justice system. A more regimented, adversarial approach could be counterproductive to the task of reforming rather than simply punishing young offenders. It was also asserted that the procedural due process standards contained in the Bill of Rights, such as the right to confront witnesses and the protection against self-incrimination, were guaranteed for defendants in criminal prosecutions. Conversely, a juvenile court hearing was technically a civil proceeding.

Finally, just one year before the Supreme Court's decision in the *Gault* case, the Court had recognized the viability of separate juvenile courts in the *Kent* decision. The case titled *In re Gault* would require the Court to consider which, if any, procedural due process obligations should be applied to the nation's juvenile courts.

LESSON 9: DECISION

After reviewing the facts surrounding the sentencing of Gerald Gault in Arizona, the Supreme Court concluded that he had been deprived of his liberty without due process of law in violation of the Fourteenth Amendment. To prevent this from happening in the future the Court, by an 8-1 vote, stipulated that juvenile courts must follow basic procedural due process standards. The majority opinion was written by Justice Fortas, while Justice Stewart offered the lone dissenting opinion.

After reviewing the valid reasons for the establishment and continued maintenance of a separate juvenile justice system, Justice Fortas noted that the failure to observe fundamental due process requirements had resulted in instances "of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." Concerning due process, Fortas went on to write:

> *Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.*

Due process standards, in other words, are necessary to maintain the proper balance between individual liberty and governmental authority.

Fortas was careful to limit the scope of his decision. He did not order or even suggest that juvenile court procedures, which emphasize rehabilitation over punishment, should be altered to coincide exactly with adult criminal courts. Rather, his aim was to introduce a level of regularity to the juvenile courts that would ensure fairness in the treatment of young offenders. Fortas reasoned that juvenile offenders are entitled to constitutional protections because "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." Concerning individuals such as Gerald Gault, Justice Fortas remarked that "the condition of being a boy does not justify a kangaroo court."

Fortas listed four basic procedural safeguards that juvenile courts would be expected to uphold: notice of charges, the right to counsel, the privilege against self-incrimination, and the right to confront witnesses. Proper notice, according to Fortas, demands the following:

> *Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'*

Justice Fortas rejected the proposition that the judge and the probation officer could sufficiently represent the interests of the juvenile. He found "no material difference" between a juvenile court judge and his or her counterpart in an adult proceeding since both ultimately render decisions that can subject individuals to a loss of liberty. A probation officer commonly acts as the arresting officer and a witness against the juvenile, which makes it inappropriate to view that person as the counsel for the accused juvenile. Fortas explained why the assistance of legal counsel is crucial:

> *The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.*

After reviewing the reasons for protecting individuals from the use of force or psychological domination, Fortas observed that it would be "surprising" if the privilege against self-incrimination was extended "to hardened criminals but not to children." Fortas then addressed the contention that the Fifth Amendment protection against self-incrimination is specifically reserved for criminal cases and, therefore, not juvenile hearings that have traditionally been viewed as civil proceedings. Fortas rejected this narrow interpretation by noting that "the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." Concerning juveniles such as Gerald Gault, Fortas wrote.

> *It would be entirely unrealistic to carve out of the Fifth amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement. In the first place, juvenile proceedings to determine 'delinquency', which may lead to commitment to a state institution, must be regarded as 'criminal'*

> *for purposes of the privilege against self-incrimination.*

It was Justice Fortas' belief that it would not hinder the informality or flexibility of the juvenile justice system to protect basic due process rights such as a proper notification of charges, the right to counsel, the right to confront witnesses, and the protection against self-incrimination. However, the petition by Gerald Gault's parents for a writ of habeas corpus also contended that a juvenile defendant had the right to an appellate review and a transcript of the proceedings. The Court concluded that it was not necessary to rule on these two aspects of the Gault case. Juvenile courts were therefore not obligated to incorporate these procedures into their respective methods of operation. However, the majority in *In re Gault* did warn state officials that a failure to allow appeals or to record proceedings could "throw a burden upon the machinery for habeas corpus" reviews.

Justice Stewart authored a brief dissenting opinion that expressed his concern that the majority's holding in *Gault* would ultimately have the negative effect of making the juvenile justice system virtually identical to adult proceedings. Stewart wrote:

> *The inflexible restrictions that the Constitution so wisely made applicable to adversary criminal trials have no inevitable place in the proceedings of those public social agencies known as juvenile or family courts. And to impose the Court's long catalog of requirements upon juvenile proceedings in every area of the country is to invite a long step backwards into the nineteenth century.*

Stewart was steadfast in his belief that juvenile proceedings are civil trials, not criminal trials. He accused the majority of using "an obscure Arizona case" to impose constitutional restrictions that were earmarked for adversarial criminal trials upon juvenile courts, where the object should be the correction of unacceptable behavior and not punishment for criminal acts.

LESSON 9: FOLLOW-UP DISCUSSION QUESTIONS

1. What is the difference between substantive due process and procedural due process? Which form of due process was at issue in *In re Gault* (1967)?

2. Why did most states originally establish separate juvenile courts?

3. Do you agree or disagree with the idea that the juvenile justice system should emphasize rehabilitation over punishment?

4. Concerning Gerald Gault, was the decision of the juvenile court in Arizona fair? Why or why not?

5. Justice Fortas referred to due process of law as the "primary and indispensable foundation of individual freedom." Do you agree with this assertion?

6. Which four procedural due process rights were extended to juvenile proceedings as a result of the *Gault* decision? Should the right to a transcript and an appellate review also be applied to juvenile proceedings?

7. Justice Stevens, in dissent, speculated that requiring juvenile courts to follow the procedures formerly reserved for adversarial adult courts would have a harmful effect. Do you agree? Why or why not?

LESSON TEN

Case: *Goss* v. *Lopez*, 1975 (419 U.S. 565; 95 S. Ct. 729).

Issue: Does a public school system violate the due process rights of a student by ordering a suspension from school without the benefit of notice or a hearing?

Objectives: At the conclusion of the lesson students should be able to:

1. consider the applicability of various procedural due process requirements in the juvenile court setting;
2. discuss whether or not a decision by the federal judiciary on the issue of public school discipline conflicts with the reserved powers doctrine established by the Tenth Amendment;
3. examine the need to balance respect for the rights of students with the need to maintain order and discipline in public schools;
4. consider reasonable alternatives to student suspensions and expulsions;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 10: BACKGROUND AND FACTS

In re Gault (1967) was a landmark decision because it contained the unequivocal declaration that a minor, as a "person" within the framework of the Fourteenth Amendment, has constitutional rights.

Three years after the Gault decision, in *In re Winship* (1970), the Supreme Court ruled that it is unconstitutional for a juvenile court to sentence a minor based simply upon "a preponderance of the evidence." This standard, commonly used in civil court proceedings, is not as stringent as the burden of proof requirement utilized in adult criminal courts. Due process of law dictates that a person must be found guilty "beyond a reasonable doubt" in a criminal court, and the *Winship* ruling placed this same obligation upon juvenile courts.

Legal analysts recognized that the Supreme Court had "constitutionalized" the reasonable doubt standard of proof for both juvenile and adult proceedings, because the phrase does not actually appear in the text of the Constitution. The Court reasoned that the civil court standard would place juveniles at an unfair disadvantage. The majority in *Winship* also reasoned that the application of the reasonable doubt standard would not disturb the distinctiveness and flexibility of juvenile proceedings.

In both the *Gault* and *Winship* decisions the Supreme Court had to balance the need to maintain a level of fundamental fairness against the equally pressing need to continue the informal nature of juvenile proceedings. In *McKeiver* v. *Pennsylvania* (1971) the Court ruled that juvenile courts should not be required to fulfill the Sixth Amendment guarantee of the right to a trial by jury. This stipulation, in the eyes of the Court, would have materially disrupted the informality of juvenile hearings by imposing an adversarial system upon juvenile courts. In *McKeiver* Justice Blackmun argued that the jury system would carry with it the "traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial."

In *Breed* v. *Jones* (1975), the Supreme Court did extend the Fifth Amendment protection against double jeopardy to minors. This particular case involved a seventeen-year- old defendant who was found to have violated the law by a juvenile court and, subsequently, was tried for the same offense as an adult. The majority opinion, written by Chief Justice Burger, emphasized that the double jeopardy safeguard is in fact necessary because a juvenile proceeding is similar to a traditional criminal prosecution in the sense that both can result in a deprivation of liberty. Unlike the *Gault* and *Winship* opinions, in *Breed* Burger indicated that it might be inappropriate to continue to view juvenile court cases as "civil" proceedings.

Two years after the *In re Gault* decision Justice Fortas proclaimed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, the *Tinker* ruling in 1969 did not clarify whether or not school administrators must adhere to due process standards when applying school discipline. Six years would pass before the Court would address this question.

During February and March of 1971 the public school system in Columbus, Ohio endured a period of widespread student unrest. School principals were empowered by Ohio law to either suspend students for up to ten days or to expel students. Suspensions and expulsions were considered necessary to maintain school discipline. Both actions required the principal to notify the offending student's parents and to state the reason for his decision. The expelled student retained the right to appeal the principal's disciplinary decision to the school board for possible reinstatement. There was no appeal process available for suspended students.

The disturbances in 1971 led to the suspension of many public school students in Columbus. One of the suspended students was Tyrone Washington, a pupil at the Marion-Franklin High School. Washington was among a group of students demonstrating in the school auditorium while a class was being conducted there. He refused to leave when ordered to do so by the school principal. Rudolph Sutton, another student who would be suspended, physically attacked a police officer who was attempting to remove Washington from the auditorium. Dwight Lopez, a student at Central High School, was suspended following a disturbance in the school's lunch room. The disturbance resulted in physical damage to school property, but Lopez maintained that he was an innocent bystander and not a participant in the lunch room melee. Washington, Sutton, and Lopez were among a group of nine students who filed a class action suit claiming that to suspend a student without providing a hearing constituted a violation of the due process clause of the Fourteenth Amendment.

The Fourteenth Amendment declares that a state cannot deprive a person of life, liberty, or property without due process of law. By statute, the state was required to provide a public school system for the residents of Ohio, and attendance until age 18 was mandated by a compulsory school attendance law. The students could therefore argue that the importance of education was underscored by the fact that for them it was both a right and a requirement. It was alleged that a ten-day suspension, under these circumstances, was significant enough to require a hearing to prevent erroneous pronouncements from being administered.

Concerning the applicability of the due process clause, it was argued that as residents of Ohio the students were entitled to a public education and a denial of this right, even for a ten day period, was a denial of "property." Additionally, it was argued that a suspension could substantially damage a student's reputation and adversely affect education and employment opportunities. Therefore, an individual's "liberty" was inexorably tied to the preservation of his or her reputation. According to the Fourteenth Amendment, any deprivation of property or liberty is unconstitutional in the absence of due process of law.

Legal counsel for the public school administrators targeted by the students' lawsuit challenged the applicability of the Fourteenth Amendment. It was argued that there was no constitutional right to an education at public expense and it was therefore incongruous to suggest that school discipline is subject to the dictates and nuances of the Constitution's due process clause. On the other hand, authority over public education is one of the powers reserved to the states via the Tenth Amendment. Consequently, it was argued, disciplinary decisions should be left to state and local school officials and not to federal judges. Finally, it was the students' contention that the central question, whether or not the due process clause prohibits the imposition of a ten-day suspension from school without a valid hearing, was an issue that lacked the necessary significance to require a constitutional interpretation by the federal judiciary. Nevertheless, the suit eventually reached the Supreme Court.

LESSON 10: DECISION

When the dispute between the public school system of Columbus, Ohio and the nine students who had been suspended was decided by the Supreme Court in 1975 the case was titled *Goss v. Lopez*. Norval Goss was one of the public school administrators who was sued by the parents of the students in this class action suit. The group of parents included Eileen Lopez, the mother of Dwight Lopez.

The Court ruled that the Ohio statute, which authorized public school administrators to suspend students for up to ten days without requiring a hearing on the matter, was an unconstitutional violation of the Fourteenth Amendment. The Court, by a 5-4 vote, held that public school officials must conform to due process of law procedures before suspensions can be imposed upon pupils.

The majority opinion in *Goss v. Lopez* (1975) was written by Justice Byron White. He conceded that Ohio is not obligated by the Constitution to maintain a public school system. However, once a public school system is established, a state is constrained by constitutional safeguards.

Justice White examined the relationship between the due process clause and conduct in schools and he discovered that students have both a property interest and a liberty interest in public education. A property interest exists, according to White, because students have a "legitimate entitlement to a public education" based on their status as residents of Ohio. Justice White also reasoned that without a hearing that adheres to the minimum requirements of the due process clause, a suspension could produce unwarranted damage to a student's reputation. As an "arbitrary deprivation of liberty" this type of disregard for the dictates of the Fourteenth Amendment could "seriously damage the students' standing with fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."

The damage that a suspension could do to a student's reputation not only established a liberty interest within the scope of the due process clause, it also led Justice White to the conclusion that such a suspension could not be imposed with complete disregard for the rights of students. The school system had argued that the loss of ten school days was neither severe nor grievous, in an effort to negate the relevance of the due process clause. A cynical Court noted that a ten-day suspension was a milder penalty than expulsion, but it remains "a serious event in the life of the suspended child."

As a jurist, White observed that none of the nine students enjoyed the benefit of a hearing either before or after his or her suspension. He expressed concern that innocent students could suffer the consequences of suspensions not rightfully inflicted upon them. White wrote:

> *The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted.*

The Court recognized that discipline and order are required for learning to take place. Accordingly, it enunciated three specific steps that are necessary to square the needed disciplinary measures with the requirements of the Fourteenth Amendment's due process clause. The Court's formula was as follows:

> *Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.*

The Court also recommended that the hearing should precede the student's removal from school. In most cases "the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred." However, the Court recognized that in some situations it might be necessary to prevent a disruption to the academic process by immediately removing a student from the school. Under these circumstances, "the necessary notice and rudimentary hearing should follow as soon as practicable."

Justice White concluded his opinion by setting procedural limits upon the Court's pronouncement that

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students facing suspension must be given notice and afforded a hearing consistent with the spirit of the due process clause. He stated emphatically that suspension hearings need not "afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." As a matter of practicality, White conceded that to require such procedures on a regular basis "might well overwhelm administrative facilities."

The Supreme Courts' 5-4 vote in *Goss* v. *Lopez* (1975) indicates that the justices were sharply divided on the constitutionality of the Ohio statute that authorized suspensions from school without a hearing. Justice Lewis Powell wrote a strong dissent that was joined by three other justices.

With an eye on the Tenth Amendment's reserved powers doctrine, Justice Powell reprimanded the majority for failing to recognize "the unique nature of public education and the correspondingly limited role of the judiciary in its supervision." Powell maintained that in order to promote discipline "school authorities must have broad discretionary authority." Justice Powell feared that the *Goss* decision would have a negative impact on the nation's public schools. He wrote:

> *The decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education. The Court holds for the first time that the federal courts, rather than education officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools.*

Concerning the Fourteenth Amendment, Powell concluded that a suspension of no more than ten days might constitute an infringement upon a student's rights, but "it is too speculative, transitory, and insubstantial to justify imposition of a constitutional rule." Powell also argued that the Ohio statute that guaranteed a resident of the state the right to a public education did not establish a right to an education free of discipline. He went on to extol the virtues of school discipline:

> *Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life.*

Finally, Justice Powell feared that the "truncated" hearing outlined in the majority opinion would prove to be counterproductive. His primary objection was that the Court was mandating an adversarial proceeding that would probably do more harm than good in a school environment. Justice Powell wrote:

> *In mandating due process procedures the Court misapprehends the reality of the normal teacher-pupil relationship. There is an ongoing relationship, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature except with respect to the chronically disruptive or insubordinate pupil whom the teacher must be free to discipline without frustrating formalities.*

LESSON 10: FOLLOW-UP DISCUSSION QUESTIONS

1. Following *In re Gault* the Supreme Court ruled on whether or not other procedural due process standards should be applied to juvenile courts. What were these decisions? Do you agree or disagree with these rulings?

2. The essence of due process is fairness. Concerning the rights of students, was the *Goss* decision fair?

3. Do you think the relatively simple hearing outlined in the *Goss* opinion is sufficient to prevent innocent students from being penalized?

4. The *Goss* case was decided in 1975. Does the precedent established in *Goss* continue to affect the way students are disciplined in your school?

5. Are suspensions and expulsions effective ways to handle discipline problems in schools? Can you suggest reasonable alternatives to maintain order in the school environment?

6. In dissent, Justice Powell argued that the procedures that accompany a 10 day suspension from school are too "insubstantial" to require a constitutional rule. Do you agree? Why or why not?

7. The Tenth Amendment reserved certain powers to the states and authority over public schools has been one of these powers. Does this mean that public school officials should not be constrained by the due process clause of the Fourteenth Amendment? Is there a way to balance reserved powers with due process of law?

LESSON ELEVEN

Case: *Ingraham v. Wright*, 1977 (430 U.S. 651; 97 S.Ct 1401).

Issue: Is corporal punishment, when inflicted upon a public school student, a violation of the protection against cruel and unusual punishment that is guaranteed by the Eighth Amendment?

Objectives: At the conclusion of the lesson students should be able to:

1. discuss whether or not corporal punishment is an appropriate means of discipline in public schools;
2. consider whether or not schools should be required to meet the basic tenets of due process of law;
3. discuss whether or not the impact of a case decided by a narrow, one-vote margin is different from a case that produces a one-sided vote by the justices on the Supreme Court;
4. suggest possible alternatives to corporal punishment that could help promote discipline in public schools;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 11: BACKGROUND AND FACTS

The Eighth Amendment prohibits the imposition of "cruel and unusual punishments." The amendment itself was taken, virtually word for word, from a provision in the Virginia Declaration of Rights of 1776. Legal scholars trace the concept of banning cruel and unusual punishment back to the English Bill of Rights which was adopted in 1689 after the accession of William and Mary to the throne. The English version was aimed at limiting the excesses of judges that were common under the reign of James II.

Interpretations of what actually constitutes cruel and unusual punishment have evolved over time as the values of society have changed. Penalties that were exacted centuries ago would generally be considered barbaric by today's standards. In recent years, the cruel and unusual punishment clause has been applied to issues such as the severity of criminal sentences and prison conditions, but the Eighth Amendment is most often thought of in relationship to the death penalty.

A Supreme Court majority has yet to declare that capital punishment is unconstitutional on the grounds that it is cruel and unusual punishment. In *Furman* v. *Georgia* (1972), the Supreme Court declared that the courtroom procedures surrounding the imposition of the death penalty must be based upon fair and rational standards, but it did not specifically prohibit capital punishment. A few years later, in *Gregg* v. *Georgia* (1976), the Court reasoned that the authors of the cruel and unusual punishment clause did not intend to forbid conventional capital punishment for serious crimes.

Supporters of the death penalty often point to the Fifth Amendment which states that a person cannot "be deprived of life, liberty, or property without due process of law." They have deduced that when due process standards are upheld, a person can be "deprived of life" for serious offenses. On the other hand, Justices William Brennan and Thurgood Marshall argued for years, usually in dissent, that evolving standards of decency mandate the prohibition of capital punishment. Justice Harry Blackmun expressed this arguement in 1994.

Corporal punishment, meaning physical punishment that is inflicted upon the body of a person, naturally receives far less attention than capital punishment. Following the decisions in *In re Gault* (1967) and *Goss* v. *Lopez* (1975), however, it was only a matter of time before the nation's highest court would consider the use of corporal punishment in public schools.

In *Gault* the Court announced that fundamental protections generated by the Fourteenth Amendment's due process clause apply to young people involved in juvenile court proceedings. In *Goss* the Court ruled that students facing suspension from public schools are also protected by the due process of law provision. The Court held that prior to a suspension a student must be provided with adequate notice of the charges against him and, if he denies the charges, he must be provided an opportunity to present his side of the story. Though informal in nature, this type of rudimentary hearing was designed to prevent an innocent student from suffering a reprimand that would remain on his or her educational record. Fairness, after all, is the essence of due process of law.

The general abandonment of corporal punishment as a means of punishing criminal offenders was recognized by a federal Court of Appeals in *Jackson* v. *Bishop* (1968), and, subsequently, this particular decision has been cited with approval by the Supreme Court. State statutes may require young people to attend school, but students are not thereby designated "criminal offenders." Whether or not public school students are protected by the cruel and unusual punishment provision contained in the Eighth Amendment would prove to be a difficult question for the Supreme Court.

The use of corporal punishment as a means of maintaining school discipline is believed to date back to colonial times. The common law principle applied then, and afterwards, was that teachers could impose reasonable but not excessive force to discipline a child. For generations the ruling doctrine was known as "in loco parentis," which means in the place of a parent. According to this doctrine a teacher's authority was derived from the pupil's parents and this justified the use of corporal punishment. In contemporary society the link between the parent and the teacher is often tenuous at best, and the concept of parental delegation has been replaced by the view that public schools, as agents of the state, can impose reasonable punishment which is necessitated by the need for group discipline. When the Supreme Court examined the issue in 1977 only two states, Massachusetts and New Jersey, prohibited the use of corporal punishment in their public schools. The dispute that culminated with a Supreme Court ruling on the constitutionality of corporal punishment in public schools originated a number of years earlier.

James Ingraham and Roosevelt Andrews were students at the Charles R. Drew Junior High School in Dade County, Florida. Ingraham was in the eighth grade while Andrews was in the ninth grade. In October, 1970 both students received paddlings for incidents that occurred at the junior high school. A state law authorized the use of corporal punishment as a disciplinary measure in the public schools. Also, a local school board regulation provided specific guidelines for the use of corporal punishment.

The Florida statute required that a teacher had to consult with the school principal prior to resorting to corporal punishment, the penalty was to be inflicted in the presence of another adult, and the punishment itself was to be neither "degrading or unduly severe." The punishment authorized by the local school board consisted of "paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick." The normal punishment was limited to one to five "licks" with the paddle. School authorities considered corporal punishment to be a less drastic means of discipline than either suspension or expulsion due to the fact that incidents involving the use of corporal punishment were not recorded in a student's file. However, contrary to the procedural requirements set by state and local regulations, the record revealed that the teachers at the Charles R. Drew Junior High School often paddled students on their own authority, without consulting the school's principal.

James Ingraham was subjected to more than twenty licks with a paddle after he was slow to respond to a teacher's instructions to leave the school auditorium. Ingraham suffered bruises that required medical attention. He also missed several days of school following this paddling which took place while he was held over a table in the principal's office.

Roosevelt Andrews had been paddled several times for relatively minor infractions, including tardiness, making noise in class, and not having the correct shoes for gym class. On two occasions Andrews was struck on his arms, and he lost the full use of one of his arms for a week following one of these paddlings.

The testimony from several other students indicated that exceptionally harsh tactics were employed to maintain discipline at the junior high school. For example, one student received fifty licks with a paddle for allegedly making an obscene phone call. Contrary to the precedent established in *Goss*, concerning the hearing that was to be conducted prior to a student's suspension, no hearing was conducted for the students in Dade County, Florida prior to their being paddled.

Ingraham and Andrews filed a lawsuit contending that Willie J. Wright, the principal at Drew Junior High School, and other administrators for the Dade County Public School System had violated two provisions of the United States Constitution. First, it was charged, the use of paddlings to maintain discipline in public schools constitutes cruel and unusual punishment in violation of the Eighth Amendment. Consistent with the incorporation doctrine, in *Robinson v. California* (1962), the Supreme Court ruled that the due process clause of the Fourteenth Amendment makes the Eighth Amendment's cruel and unusual punishment provision binding upon the states. The second charge in the suit filed by Ingraham and Andrews was that the Fourteenth Amendment's due process clause also requires the school system to provide prior notice and an opportunity to be heard before a student is subjected to corporal punishment.

Representatives for the school system answered these charges by pointing out that corporal punishment was accepted across most of the nation as a viable and reasonable means of maintaining discipline in public schools. They also argued that a hearing is necessary for suspensions and expulsions because those measures leave permanent marks on a student's record. On the other hand, corporal punishment is temporary in duration in the sense that there is no citation in the student's file.

The school authorities further held that the Florida statute limited the use of corporal punishment in public schools by prohibiting any punishment that was "degrading or unduly severe." Any punishment that violated this legal tenet was subject to both civil and criminal liability. Therefore, it was argued, the common law provided a potential remedy for any student who believed that his or her punishment exceeded the reasonable limits established by the Florida statute.

Conversely, legal counsel for the students argued that it was simply incongruous that a public school system could authorize the infliction of a physical punishment upon a child with impunity, when that very same punishment would be considered cruel and unusual if inflicted upon an adult convicted of a crime. However, the Court was thereby being asked to establish a completely new precedent since coverage under the Eighth Amendment to this point had been limited to the criminal process. Essentially, the students were asserting that the use of excessive force by an agent of the state constitutes cruel and unusual punishment in violation of the Eight Amendment whether it takes place in a prison cellblock or a principal's office.

LESSON 11: DECISION

In *Ingraham v. Wright* (1977), the Supreme Court ruled that the Eighth Amendment's protection against cruel and unusual punishment is limited to the criminal process. Therefore, the provision could not be applied to school discipline matters, such as the use of corporal punishment. The Court also denied the students' contention that a hearing should be required prior to the use of corporal punishment. The majority reasoned that due process standards are met by the opportunity for civil and/or criminal litigation.

A closely divided Court voted 5-4 in this case, and the majority opinion was written by Justice Lewis Powell. A former school board president, Powell had written a dissent two years earlier in *Goss v. Lopez*. He opened his opinion in *Ingraham* by reviewing the English roots of the cruel and unusual punishment standard and its application in colonial America. He discovered that prior to the ratification of the Eighth Amendment the standard was exclusively applied to the criminal process.

Justice Powell related that when the Eighth Amendment was debated in the First Congress the primary objection was that the cruel and unusual punishment provision "might have the effect of outlawing what were then the common criminal punishments of hanging, whipping, and earcropping." This objection was not heeded because the majority favored a limitation upon the national legislature's power to establish penalties for crimes. Accordingly, Powell argued, the Supreme Court had consistently viewed the cruel and unusual punishment provision in the context of the criminal process. He wrote:

> *In light of this history, it is not surprising to find that every decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments had dealt with a criminal punishment.*

Justice Powell then focused his attention upon the fact that public school teachers have traditionally been privileged by the common law to inflict corporal punishment that is "reasonably necessary for the proper education and discipline of the child", but punishment that exceeds this privilege "may result in both civil and criminal liability." The existence of these common law remedies led the Court to its rejection of the students' second charge, that a hearing must precede the use of corporal punishment.

The Fourteenth Amendment commands that a state cannot "deprive any person of life, liberty, or property without due process of law." The Court conceded that "corporal punishment in public schools implicates a constitutionally protected liberty interest", but it then asserted that "traditional common law remedies are fully adequate to afford due process." The Florida penal code made malicious punishment of a child a felony. Any student who was the victim of unjustified or excessive punishment also had the right to file a civil suit to collect damages. The Court was convinced that the presence of civil and criminal sanctions would discourage abuses of the common law right to employ corporal punishment in public schools.

The Court considered the Florida statute to be "a legislative judgment, rooted in history and reaffirmed in the laws of many States, that corporal punishment serves important education interests." Powell speculated that it would be counterproductive to mandate a hearing prior to the use of corporal punishment. He wrote:

> *Such a universal constitutional requirement would significantly burden the use of corporal punishment as a disciplinary measure. Hearings—even informal hearings—require time, personnel, and a diversion of attention from normal school pursuits. School authorities may well choose to abandon corporal punishment rather than incur the burdens of complying with the procedural requirements.*

Despite the testimony from a number of students from Drew Junior High School that they had been the victims of harsh treatment, the Court concluded that "such mistreatment is an aberration." The Court's decision in *Ingraham v. Wright* was destined to affect public schools across the nation, not just a single school in Florida, and the justices were certainly cognizant of this fact. The majority in *Ingraham* reasoned that the threat to the substantive rights of school children "can only be regarded as minimal" due to "the openness of our schools, and the common law safeguards that already exist."

Justice Byron White, who wrote majority opinion in *Goss v. Lopez* (1975), wrote a strong dissent in *Ingraham v. Wright* (1977) that was joined by three other justices. For White it was simply inconceivable that some punishments that are so "barbaric" they cannot be imposed for the commission of crimes, nonetheless,

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are considered appropriate "for less culpable acts, such as breaches of school discipline."

Justice White chastised the majority for "relying on a vague and inconclusive" reading of the history of the Eighth Amendment. He offered his own analysis of the Constitution's provision on cruel and unusual punishment:

> *Certainly the fact that the Framers did not choose to insert the word 'criminal' into the language of the Eighth Amendment is strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment is imposed.*

Justice White believed that the majority's contradictory reading of the Eighth Amendment was illustrated by the example of the Drew Junior High School student who received fifty licks with a paddle for allegedly making an obscene phone call. The offense itself was a misdemeanor under Florida law, White observed, and if a state court had imposed such a paddling, the penalty most certainly would have been considered a violation of the protection against cruel and unusual punishment.

White stressed that he was not advocating a total ban on the use of corporal punishment in the nation's public schools, rather, he was objecting to "the extreme view of the majority that punishment in public schools, no matter how barbaric, inhumane, or severe, is never limited by the Eighth Amendment." White also dismissed the majority's position that the openness of public schools was a sufficient safeguard against injustices, stating that "if a punishment is so barbaric and inhumane that it goes beyond the tolerance of a civilized society, its openness to public scrutiny should have nothing to do with its constitutional validity."

In *Goss* v. *Lopez* (1975), the Court had ruled that prior to a student's suspension from school a rudimentary hearing was required to satisfy the dictates of the due process clause. As the author of the *Goss* precedent, White vehemently objected to the finding in *Ingraham* that common law remedies are adequate safeguards against possible violations of student rights. He wrote:

> *There is every reason to require, as the Court did in* **Goss**, *a few minutes of 'informal give-and-take between student and disciplinarian' as a 'meaningful hedge' against the erroneous infliction of irreparable injury.*

Justice White cited two reasons why the potential for civil damages was "utterly inadequate" as a protection against erroneous or excessive punishment. First, under Florida law, a student was not entitled to damages provided the teacher acted in "good faith." Therefore, even if the penalty was the result of mistaken facts, as long as the punishment was reasonable from the perspective of the disciplinarian then the student's suit would be dismissed. Second, and more importantly, a lawsuit could only be filed after the punishment has been imposed making the infliction of physical pain "final and irreparable." A subsequent proceeding, be it in civil or criminal court, can never undo the pain and embarrassment that is inherent in any imposition of corporal punishment. White complained that the effort to justify corporal punishment on the grounds that an innocent victim could later recover damages or file a suit for criminal misconduct was the product of faulty logic. He asserted that this type of reasoning would permit a state to sentence a driver to a one-day jail sentence for speeding without the benefit of a trial, so long as the driver could subsequently sue the state to recover damages for wrongful imprisonment. Fairness is always at the heart of any question concerning due process of law.

Regardless of the Court's decision in *Ingraham* v. *Wright*, most school districts and several state governments have strictly regulated or eliminated corporal punishment in public schools. Further, lower federal courts have specified due process procedures rights for students facing corporal punishment. These procedures include prior notice to students about the kinds of infractions that could result in corporal punishment. And, administration of this kind of punishment can be done only by one school official in the presence of another school official.

LESSON 11: FOLLOW-UP DISCUSSION QUESTIONS

1. The majority opinion in *Ingraham v. Wright* (1977) asserted that one of the lessons of history is that "corporal punishment serves important educational interests." Do you agree?

2. The Court in Ingraham ruled that a hearing prior to the actual use of corporal punishment was unnecessary because any teacher who abused this privilege could be the target of a civil suit for damages or even criminal charges. Do you agree with this position?

3. The majority in Ingraham argued that the "openness" of public schools was a safeguard against the use of cruel and unusual punishment, unlike prisons where inmates are separated from the outside world. Do you agree with this line of reasoning?

4. Justice White, in dissent, argued that the Eighth Amendment prohibits all forms of cruel and unusual punishment perpetrated by the government, not just "criminal" penalties. Do you agree with his analysis, which is expansive enough to include the use of corporal punishment in public schools?

5. The decision in *Ingraham* came only two years after the Court's ruling in *Goss v. Lopez* (1975). Is *Ingraham* inconsistent with the earlier precedent?

6. Both *Ingraham* and *Goss* were decided by 5-4 votes. What does this tell you about the Supreme Court and issues related to school discipline?

7. The essence of due process if fairness. In the school environment what forms of punishment do you consider unfair? What penalties would you suggest to maintain order in school?

LESSON TWELVE

Case: *New Jersey v. T.L.O.*, 1985 (469 U.S. 325; 105 S.Ct. 733).

Issue: To what extent are public school officials limited by the Fourth Amendment's prohibition against unreasonable searches and seizures in their dealings with students?

Objectives: At the conclusion of the lesson students should be able to:

1. discuss the reasons why citizens are protected from unreasonable searches and seizures by the government;
2. decide whether or not the exclusionary rule is necessary to enforce the standards established in the Fourth Amendment;
3. consider situations where a search is reasonable and necessary even though a warrant has not been issued;
4. discuss whether or not the constitutional rights of students should be limited in the school environment;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 12: BACKGROUND AND FACTS

The Fourth Amendment to the United States Constitution states the following:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

The Constitution's protection against unreasonable searches and seizures was largely an effort to prevent a duplication of injustices practiced by the British prior to the American Revolution. General warrants, known as writs of assistance, had authorized British custom officials to enforce trade laws by searching for smuggled goods in the homes of American colonists. These writs permitted the search of all houses suspected of containing contraband, without naming alleged offenders, or describing the particular places to be searched, or even the inventory of objects subject to the search. The writ was to be valid during the lifetime of the reigning monarch.

Many colonists objected to writs of assistance on the grounds that the documents authorized unacceptable invasions of privacy. Following the revolution the Fourth Amendment was designed to prevent the newly formed national government from perpetrating unreasonable searches of a similar nature. As a result, the amendment required a specific description of the place to be searched, and the persons or items to be seized.

It is important to remember that the Fourth Amendment prohibits unreasonable searches, while reasonable searches are constitutionally valid. In some cases even a warrantless search can be reasonable and, in truth, more searches are conducted without warrants than with warrants. Generally, a search warrant is not required if the delay involved in obtaining a warrant would defeat the purpose of conducting the search. The determination is based on what are called "exigent circumstances." For example, incident to an arrest, a warrantless search is often required to locate a concealed weapon that could endanger the life of the arresting officer, or to prevent evidence from being destroyed or misplaced. A warrantless search can also be necessitated to prevent an automobile from escaping scrutiny, or to obtain a blood sample to measure a suspect's correct level of intoxication at the time of his or her arrest. Also, police officers in "hot pursuit" of a criminal suspect cannot reasonably be expected to stop and obtain a warrant prior to entering and exploring a building. In all of these situations, the delay in obtaining a warrant would make effective law enforcement virtually impossible.

What if the police enter a home with a valid warrant that authorizes a search for stolen weapons only to discover cocaine openly on display on a table? In *Coolidge* v. *New Hampshire*, (1971) the Supreme Court recognized that police officers cannot be expected to ignore incriminating evidence that is left in "plain view." As long as the officer has a legal right to be in the location, and when the discovery of the visibly incriminating evidence is inadvertent, it would be impractical to require the police to delay the arrest by applying for a second warrant.

On the other hand, the Supreme Court has ordered that items obtained in direct violation of the Fourth Amendment cannot be presented in court as evidence against a defendant. This doctrine, known as the exclusionary rule, was applied to federal proceedings in *Weeks* v. *United States* (1914). According to Justice Day, if illicitly obtained material was allowed in trial proceedings the Fourth Amendment "might as well be stricken from the Constitution."

The American judicial system is founded upon the concept of fundamental fairness, which gives credence to the exclusionary rule. Justice Louis Brandeis once wrote that when "the government becomes a lawbreaker, it breeds contempt for law." Justice Benjamin Cardozo reasoned that whenever "the constable has blundered" the criminal must go free. However, the *Weeks* decision was limited to federal proceedings and most criminal cases are prosecuted under state laws.

In *Wolf* v. *Colorado* (1949), the Supreme Court invoked the incorporation doctrine when it ruled that the Fourth Amendment's protection against unreasonable searches and seizures is binding on the states via the due process clause of the Fourteenth Amendment. However, the Court simultaneously ruled that the exclusionary rule is not a necessary part of the Fourth Amendment. This ambiguity led to the conclusion that in a state court "the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

In 1961, however, the Court overturned the *Wolf* precedent. In *Mapp* v. *Ohio* (1961), the Supreme Court proclaimed that "the exclusionary rule is an essential part of both the Fourth and the Fourteenth Amendments." Justice Tom C. Clark, in applying the exclusionary rule to state proceedings, wrote:

> *Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.*

Proponents of the exclusionary rule argue that it promotes justice by removing any incentive that police officers might have for conducting a search in violation of the Fourth Amendment. Opponents of the exclusionary rule contend that a guilty suspect can go free if a prosecutor is denied the use of pertinent evidence due to a mere technicality. Whether or not the end justifies the means is the question at the center of the debate.

In *United States* v. *Leon* (1984), the Supreme Court established the "good faith" exception to the exclusionary rule. Justice White returned to the language of *Wolf* when he wrote that the Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands." White reasoned that since the exclusionary rule was a "judicially created remedy", it could be modified by the judiciary. The defendant in *Leon* was arrested as a result of a search warrant subsequently shown to be unsupported by probable cause. However, the police officers acted in good faith that the judge had issued a valid warrant. Citing "substantial social costs exacted by the exclusionary rule", the Court concluded that evidence obtained as a result of a technically flawed warrant was still admissible in court so long as the police officers sincerely believed that they were executing a valid warrant.

The year after the *Leon* decision the Supreme Court considered whether or not a public school administrator can search through a student's property without violating the dictates of the Fourth Amendment. On March 7, 1980 a teacher at Piscataway High School in Middlesex County, New Jersey allegedly discovered two girls smoking in a school lavatory. Smoking was a violation of a school rule so the teacher took the two girls to see the school's Assistant Principal, Theodore Choplick.

One of the girls was a 14-year-old freshman. Due to her status as a minor, she would later be identified by her initials, T.L.O., in court records. When questioned by Mr. Choplick about the incident in the girls' restroom she claimed that she did not smoke at all. Choplick responded by demanding to see T.L.O.'s purse. Upon opening the purse the assistant principal discovered a pack of cigarettes, which he held before the student while accusing her of having lied to him.

When he removed the cigarettes from the purse, Choplick also noticed a package of cigarette rolling papers. The school administrator knew that rolling papers were commonly used for smoking marijuana and he suspected that a closer examination of the purse might reveal further evidence of drug use. As Choplick proceeded to search the purse more thoroughly he discovered a small amount of marijuana, a pipe, a number of small plastic bags, and a substantial quantity of money in one dollar bills. The assistant principal extended the search to a separate zippered compartment of the purse where he discovered an index card that listed students who owed T.L.O. money, as well as two letters that further implicated the freshman in marijuana dealing.

Assistant Principal Choplick notified the mother of T.L.O. and the police. He turned the evidence he had extracted from T.L.O.'s purse over to the police. At the request of the police, T.L.O.'s mother took her daughter to police headquarters where the student confessed that she had indeed been selling marijuana at Piscataway High School.

On the basis of the evidence seized by Mr. Choplick and T.L.O.'s confession, delinquency charges were brought by the state against the student. During the juvenile court proceedings, legal counsel for T.L.O. moved to suppress the evidence on the grounds that the assistant principal's search of her purse violated the Fourth Amendment. It was also argued that T.L.O.'s confession was tainted by the allegedly unlawful search. The juvenile court, however, denied the motion to suppress the evidence and the confession. As a result, T.L.O. was classified a delinquent and sentenced to one year's probation.

T.L.O. appealed the decision on the contention that a valid search requires a warrant founded upon probable cause. It was argued that Choplick violated these standards and thereby committed an illegal search when he rummaged through T.L.O.'s purse. To advance this position it was necessary to contend that students in public schools are protected by the Fourth Amendment and that Mr. Choplick's actions were contrary to T.L.O.'s reasonable expectation of privacy. Choplick was identified as an agent of the state and, in *Wolf* v. *Colorado* (1949), the Supreme Court had previously ruled that the due process clause of the Fourteenth Amendment requires individual states to follow the search and seizure tenets of the Fourth Amendment. In *Mapp* v. *Ohio* (1961), the Court announced that the exclusionary rule requires state courts to omit evidence that is the product of an illegal search and seizure.

On the other hand, when the decision was appealed, lawyers representing the state of New Jersey argued that the Fourth Amendment regulates only searches and seizures that are carried out by law enforcement officers. School officials are required to maintain order in public schools and Mr. Choplick's actions, it was claimed, merely constituted an effort to prevent the sale of marijuana to students. A teacher reported that T.L.O. had violated a school rule that restricted smoking on school grounds to a few designated areas, and, it was argued, her denial justified checking her purse for incriminating evidence. This line of reasoning held that once the purse was open, evidence of marijuana use was in plain view, and it was the presence of the incriminating rolling papers that led to the crucial discovery that T.L.O. was involved in the sale of marijuana to other students. Given his position as a school disciplinarian, all of Choplick's actions were presented as being reasonable.

The Supreme Court's difficult task was to balance a student's expectation of privacy with the legitimate need to maintain an orderly environment in a public school which allows learning to take place.

LESSON 12: DECISION

In *New Jersey* v. *T.L.O.* (1985), the Supreme Court ruled that the Fourth Amendment ban on unreasonable searches and seizures applied to searches conducted by public school officials, but that the search of T.L.O.'s purse was reasonable. The Court reached this conclusion by reasoning that school officials do not have to meet the same standards that are applied to police officers when conducting a search.

The Court voted 6-3 in this case and the majority opinion was written by Justice Byron White. A decade earlier, in *Goss* v. *Lopez* (1975), White had argued that public schools cannot suspend students without first providing a hearing consistent with the principle of due process of law. It should be noted, however, in the area of search and seizure doctrine, White had authored the "good faith" exception promulgated in *United States* v. *Leon* (1984).

The Court's reasoning in *T.L.O.* was markedly different from that in *Ingraham* v. *Wright* (1977). In *Ingraham* the Court ruled that the Eighth Amendment's ban on cruel and unusual punishment is applicable in the criminal justice system, but it cannot be invoked when the setting is a public school. Nonetheless, the Court's opinion in *T.L.O.* opened by rejecting a similar proposal advanced by the state of New Jersey that the Fourth Amendment was intended to regulate only searches conducted by law enforcement officers. Rather, the Amendment's prohibition on unreasonable searches and seizures was interpreted by the Court as a restraint upon "governmental action", including searches conducted by public school officials who were recognized as being representatives of the state. Consistent with the incorporation doctrine, it is the due process clause of the Fourteenth Amendment that requires a state and its representatives to follow the dictates of the Fourth Amendment.

Some might argue that the Court's finding that the actions of public school officials are within the scope of the Fourth Amendment would prove to be a Pyrrhic victory for students once the Court turned its attention to the exact procedures to be followed by school officials. Justice White's objective was to balance "the individual's legitimate expectations of privacy and personal security", with "the government's need for effective methods to deal with breaches of public order." The Court recognized that maintaining discipline in a public school was a difficult task, but "the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." On the other hand, the Court cited drug use and violent crime as "particularly ugly forms" of school disorder. To preserve order in the schools, White condoned "the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."

Concerning the actual requirements outlined in the Fourth Amendment, the warrant requirement was acknowledged to be unsuited for the school environment because it would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." Ordinarily a search, with or without a warrant, must be based upon the Fourth Amendment's "probable cause" requirement. Considering this requirement in light of the pressing need to maintain order in the schools, White established the following standard:

> *[T]he accommodation of the privacy interests of school children with the substanial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.*

White introduced a "twofold inquiry" that would allow school officials to implement this new "reasonableness" standard. First, he argued, a search is justified at its inception when there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." Second, once initiated, a search "will be permissible in its scope when the measures adopted are reasonable related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." White reasoned that by focusing attention on reasonableness, school officials could rely on common sense rather than "schooling themselves in the niceties of probable cause."

Concerning Assistant Principal Choplick's search of T.L.O.'s purse, Justice White felt it was not unreasonable for the school administrator to examine the purse to see if it contained cigarettes. Further, the simultaneous discovery of rolling papers "gave rise to a reasonable suspicion that T.L.O. was carrying marijuana." It was Choplick's successful search for marijuana that revealed the more incriminating evidence that T.L.O. was involved in marijuana trafficking.

In the celebrated *Tinker* decision, it was announced that public school students do not shed their constitutional rights "at the schoolhouse gate." By lowering the standard from probable cause to reasonableness for searches conducted in public schools, the *T.L.O.* decision could be seen as evidence that once a student actually enters the schoolhouse door, his or her constitutional rights have been significantly altered. Due to the "special characteristics of the school environment", on more than one occasion the Supreme Court has conceded that constitutional rights are not protected to the same degree inside the school that is required outside the school.

Justice William Brennan and Justice John Paul Stevens both wrote dissenting opinions in *New Jersey v. T.L.O.* (1985). Justice Brennan objected to replacing the probable cause standard which is found in the text of the Fourth Amendment with "reasonableness," a lower standard. He labeled this departure from prior rulings "unclear, unprecedented, and unnecessary." Brennan agreed with the majority that warrants are not required in schools, but he reasoned that a full-scale search is only reasonable when there is probable cause to justify the search. A balancing test, such as the one that lowers the probable cause standard to "reasonableness," is only justified when the intrusion upon a person's privacy is "substantially less intrusive than full-scale searches", according to Brennan. The "stop and frisk" procedure utilized by police officers was cited as an example of a constitutionally acceptable action that does not require probable cause because it is less intrusive on privacy than a thorough search.

Brennan defended the individual's "right to be let alone" and he lamented that the majority's balancing test would replace the constitutional threshold of probable cause with one that was "more convenient for those enforcing the laws but less protective of citizens' liberty." Justice Brennan also predicted that rather than allowing school officials to rely on common sense, the "reasonableness" standard will likely spawn increased litigation and greater uncertainty among teachers and administrators."

Concerning the search of T.L.O.'s purse, Justice Brennan concluded that since Mr. Choplick's concern was whether or not the student had been smoking in the girls' restroom, his search was "complete" once his discovered the cigarettes. Brennan argued that the mere presence of rolling papers did not provide the probable cause necessary to justify a further examination of the contents of the purse. Brennan offered the following analogy:

> *Just as a police officer could not obtain a warrant to search a home based solely on his claim that he had seen a package of cigarette papers in that home, Mr. Choplick was not entitled to search possibly the most private possessions of T.L.O. based on the mere presence of a package of cigarette papers.*

Justice Stevens observed that since the school allowed smoking in designated areas, the mere possession of cigarettes did not violate a school rule. Therefore, he reasoned, the contents of the purse had no direct bearing on the alleged infraction. Stevens believed that the assistant principal simply "overreacted" because the reported offense did not significantly disrupt school order or the educational process. Viewing the incident at Piscataway High School from this perspective, Stevens concluded that "the invasion of privacy associated with the forcible opening of T.L.O.'s purse was entirely unjustified at its inception."

Consistent with the precedent established in *Mapp v. Ohio* (1961), any evidence obtained by a search that violates the dictates of the Fourth Amendment is inadmissible in a state court. Stevens feared that by ignoring the exclusionary rule, the Court's holding in T.L.O. would "permit school administrators to search students suspected of violating only the most trivial school regulations." This contention was based on the majority's ruling that a search is appropriate whenever it is reasonable to suspect that either a law or a school rule has been violated. Consequently, as Stevens observed:

> *For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity.*

Stevens conceded that warrantless searches of students are justified to prevent "violent, unlawful, or seriously disruptive conduct", but he viewed the indiscriminate search of a young woman's purse by a school administrator as a "serious invasion of her legitimate expectations of privacy."

Justice Stevens was also concerned that creating an exemption from established constitutional principles for public schools was contrary to the values that the educational system should strive to impress upon American students. He wrote:

> *Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly.*

LESSON 12: FOLLOW-UP DISCUSSION QUESTIONS

1. Occasionally a guilty individual will go free as a result of the exclusionary rule. Does the Fourth Amendment require the continued use of the exclusionary rule in American jurisprudence?

2. If a warrant is issued by a judge despite insufficient probable cause, and police officers use the warrant in "good faith" to make an arrest, should the arrest stand?

3. Is it fair to prohibit conduct in high schools "that would be perfectly permissible if undertaken by an adult", as Justice White observed?

4. Do you agree with the Court's conclusion in *New Jersey* v. *T.L.O.* that school officials can conduct a search when it is "reasonable," rather than being held to the higher standard of probable cause?

5. Was the search of T.L.O.'s purse "reasonable?" Was there probable cause to search her purse?

6. Would it be "reasonable" to have students pass through metal detectors when they enter a school? Would this be an invasion of privacy?

7. Justice Stevens, in dissent, expressed concern that students would lose respect for a system that did not fully protect their right to be protected by the Fourth Amendment. Do you agree that the majority in *T.L.O.* was allowing school officials to act in a manner contrary to the values that educators are expected to emphasize?

V

EQUAL PROTECTION OF THE LAWS

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

—Fourteenth Amendment to the Constitution of the United States of America

Lessons on Supreme Court Cases:

Lesson 13 - *Brown v. Board of Education of Topeka* (1954)
Lesson 14 - *San Antonio School District v. Rodriguez* (1973)
Lesson 15 - *Runyon v. McCrary* (1976)
Lesson 16 - *Plyler v. Doe* (1982)

LESSON THIRTEEN

Case: *Brown* v. *Board of Education of Topeka*, 1954 (347 U.S. 483; 74 S.Ct. 686).

Issue: Does the operation of racially segregated public schools violate the equal protection clause of the Fourteenth Amendment even when the educational facilities are essentially equal?

Objectives: At the conclusion of the lesson students should be able to:

1. discuss the purpose and meaning of the Fourteenth Amendment's equal protection clause;
2. consider the reasoning behind the "separate but equal" doctrine expressed in *Plessy* v. *Ferguson* (1896);
3. discuss the factors that contributed to the enactment of segregation laws in the United States;
4. analyze influences other than legal precedents that can help shape a Supreme Court decision;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 13: BACKGROUND AND FACTS

The opening section of the Fourteenth Amendment to the United States Constitution reads as follows:

> *All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The amendment was ratified in 1868 and its primary purpose was to guarantee the citizenship of recently freed slaves. The inclusion of the due process clause was necessary to protect the basic civil rights of these individuals following the Civil War. The liberty component of this due process clause is the foundation of the incorporation doctrine, whereby many of the safeguards enumerated in the Bill of Rights have been extended to include protections against actions by state governments. Originally, the Bill of Rights served solely as a limit upon the national government. Consequently, the Fourteenth Amendment has come to be known as the "second Bill of Rights." The amendment extended the concept of liberty, and it guaranteed equality as well.

The ideal of equality, so eloquently expressed by Thomas Jefferson in the Declaration of Independence, was conspicuously absent from the original text of the Constitution. The document did prohibit titles of nobility, but it did not prohibit slavery. The Fourteenth Amendment's equal protection clause was the Constitution's first explicit guarantee of legal equality.

It is important to remember that laws inherently make distinctions between categories of people. The crucial question is whether or not the classification is reasonable and, thereby, permissible. For example, when a state legislature limits the issuing of a driver's license to individuals at least sixteen-years-old the law is not considered to be discriminatory. The phrase "equal protection of the laws" means that no individual or group should receive special privileges or be deprived of basic rights by the government.

Following Reconstruction, the presence of the equal protection clause did not inhibit legislatures across the South from enacting a wide variety of segregation laws that were designed to separate whites and blacks as much as possible. The statutes were know as Jim Crow laws, as they were named after a minstrel character popularized around 1830.

In 1890 a Louisiana statute required railroad companies to provide "equal but separate accommodations" for the two races. The segregation of railroad passengers had previously been mandated in Florida, Mississippi, and Texas. In 1892 Homer Plessy, who described himself as being "of seventh-eights Caucasian and one-eighth African blood", decided to test the Louisiana statute. He bought a first class ticket in New Orleans and took a seat in a passenger car reserved for whites. The conductor ordered Plessy to move to the car designated for blacks and, after his refusal, Plessy was forcibly removed from the train and then arrested. His subsequent conviction was appealed to the United States Supreme Court where the law was challenged as an unconstitutional violation of the Fourteenth Amendment's equal protection clause.

In *Plessy v. Ferguson* (1896), the Court applied a "reasonableness" standard and concluded that:

> *Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable.*

The Court's opinion, written by Justice Henry B. Brown, asserted that the purpose of the Fourteenth Amendment was to establish legal equality and that "it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality." Brown also argued that segregation laws "do not necessarily imply the inferiority of either race to the other", and, again as a matter of reasonableness, such laws are necessary for "the preservation of public peace and good order."

The lone dissent in the 7-1 *Plessy* decision was offered by Justice John Marshall Harlan, who held that segregation placed a "badge of servitude" upon those in the minority. Harlan stridently wrote:

> *But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.*

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Justice Harlan, with an eye on the nation's future, believed that segregation laws would prove to be counterproductive. He wrote:

> *The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.*

The net effect of the *Plessy* decision was to sanction the development of codes across the South that called for racial segregation in virtually every aspect of public life. In addition to transportation, separate hospitals, parks, libraries, hotels, restaurants, cemeteries, public restrooms and drinking fountains were all required by law. In South Carolina black and white mill workers were prohibited from looking out the same window, and it was not unusual for local ordinances in many areas of the South to ban blacks and whites from playing checkers together.

The majority opinion in *Plessy* recognized that the "most common instance" of state-imposed segregation was "the establishment of separate schools for white and colored children." The Court reasoned that this was a "valid exercise of the legislative power" held by the various states. Actually, the Court in *Plessy* relied heavily upon *Roberts v. City of Boston* (1849), a decision rendered by the Supreme Judicial Court of Massachusetts which upheld the establishment of racially segregated schools. However, legal scholars have since criticized Justice Brown for citing *Roberts* as a precedent since this particular case was decided prior to the ratification of the Fourteenth Amendment. The *Roberts* decision was also based upon an interpretation of the Massachusetts Constitution, and not the United States Constitution. Further, the Massachusetts legislature banned segregated schools in 1855, four decades before the "separate but equal" theory was espoused in *Plessy*. According to this theory, segregation was constitutional as long as the facilities or services offered to blacks were substantially equal to those available to the white population.

In the wake of *Plessy* two societies actually developed in the South, one black and one white, separate but definitely not equal. In 1930 a study of public school expenditures provided evidence of this unequal development. South Carolina was spending ten times as much on the education of every white child as it was on every black child. In Florida, Georgia, Mississippi, and Alabama five times as much was being spent on the education of the average white child. Twice as much was being spent in North Carolina, Maryland, Virginia, Texas, and Oklahoma. This type of disparity did not go unnoticed or unchallenged. The National Association of the Advancement of Colored People (NAACP) led the fight against America's caste system.

The NAACP was founded in 1909 to promote the ideal of racial equality. Many Americans believed this goal was achievable after 360,000 blacks served in the military during World War I. The war also generated a mass migration of blacks to the North in search of employment in defense plants. Unfortunately, the 1920's were marred by race riots, lynchings, and a revival of the Ku Klux Klan.

During the 1930's the NAACP launched its campaign against segregation by using the courts. In 1935 Charles Hamilton Houston became the organization's chief legal counsel. He assembled a formidable team of litigators by recruiting many of the top graduates from the Howard University Law School, where he had been the dean. Initially, Houston's strategy was to force states to adhere to the "separate but equal" doctrine by exposing the inequalities that existed at the graduate school level of higher education. Law schools and medical schools for blacks were virtually non-existent in the South, and segregation laws barred blacks from the graduate schools that were in operation. Houston was hopeful that the exorbitant cost of establishing separate graduate schools for blacks would convince states to simply desegregate the existing schools. Houston expected that there would be less resistance to segregation at this level of education, and he anticipated that legal victories would establish precedents that would eventually lead to the desegregation of all public schools.

The first time the Supreme Court confronted the issue of school segregation directly was in *Gong Lum v. Rice* (1927). The case was initiated after a child of Chinese ancestry had been classified as being "colored" and thereby excluded from an all-white school. The Court ruled that a state's right to settle issues concerning the racial segregation of its public schools, without the "intervention of the federal courts", was firmly established in *Plessy v. Ferguson* (1896).

The NAACP scored an important legal victory in the judicial arena in *Missouri ex rel. Gaines v. Canada* (1938). The Court ruled that Missouri's practice of offering to finance the law school education of qualified black students in another state failed to satisfy the equal protection requirement of the Fourteenth Amendment. Missouri did not operate a law school for blacks, and it was determined to perpetuate the racially motivated admission policy that excluded blacks from the state university. Missouri responded to the ruling by taking steps to establish a law school at the all-black Lincoln University.

In 1950 the Supreme Court handed down a pair of decisions that would profoundly affect the drive for racial equality in the United States. In *Sweatt v. Painter* (1950), the Court concluded that an accurate measure of whether or not separate educational facilities are equal must examine more than just tangible factors, such as buildings and class sizes. In an effort to keep its state university segregated, Texas had attempted to establish a law school for blacks virtually overnight. The Court determined this effort to be an unconstitutional violation of the equal protection clause on the grounds that the state had failed to achieve equality in terms of the factors that combine to give a law school prestige, such as the reputation of the faculty and support from influential alumni.

In *McLaurin v. Oklahoma State Regents* (1950), the Supreme Court examined an effort by a graduate school of education to segregate its lone black student by compelling him to sit in roped-off sections designated "reserved for colored" in classrooms, the library, and the cafeteria. The Court ruled that this type of ostracism "handicapped" the student's pursuit of a graduate degree so severely that it constituted a violation of the equal protection clause.

Ostensibly, the rulings in *Sweatt* and *McLaurin* sustained the "separate but equal" doctrine promulgated in *Plessy*. However, both decisions indicated that the Court was prepared to consider intangible factors that would make it much more difficult for states to convince a majority of the justices that separate educational facilities could ever be truly equal.

By 1950, Thurgood Marshall had been directing the NAACP's legal defense fund for a decade. The organization's twin victories in *Sweatt* and *McLaurin* convinced him that the time was right for a frontal assault on the segregation of elementary and secondary schools.

The NAACP initiated suits in four states and the District of Columbia that would be combined under the title *Brown v. Board of Education of Topeka* (1954). In addition to Kansas, the suits originated in South Carolina, Virginia, and Delaware. In each case the NAACP represented black children who were seeking admission to all-white, segregated public schools. The suits not only claimed that the elementary and secondary schools for blacks were inferior, but also that the "separate but equal" doctrine was intrinsically a violation of the Fourteenth Amendment's equal protection clause.

In Kansas, a state law permitted, but did not require, local school districts to administer racially segregated schools in any community where the population exceeded 15,000 people. In Topeka, Kansas the elementary grades were segregated which required Linda Brown, an eight year-old black student, to cross a railroad yard and journey over twenty blocks to the nearest all-black school. A school reserved for whites was just three blocks from the home of the Brown family. Similar circumstances existed in the cases filed in the other states and the District of Columbia.

In 1954, when the combined school desegregation cases would be decided, seventeen states maintained segregated schools. A few were border states, but most were located in the South or the Southwest. Following the *Sweatt* and *McLaurin* decisions in 1950, many of these states took steps to improve their schools for blacks in an effort to preserve the "separate but equal" precedent. However, by 1954, an average of thirty percent more money was being spent to educate the average white child in these seventeen states. Nevertheless, the lower courts in Kansas, South Carolina, and Virginia determined that the segregated schools were either substantially equal or on the path to providing facilities that were relatively equal in areas such as buildings, curricula, transportation, and teachers. As a result, each of the lower courts in these three states ruled that there was no constitutional violation of the *Plessy* precedent.

In the Delaware case, the lower court did order the white schools accept black students on the grounds that the black schools were not equal and the students thereby were subject to an inferior education. The Delaware case produced a verdict that deviated from the pattern evident in the other states, but the decision also sustained *Plessy* by affirming that separate facilities were acceptable so long as they were basically equal.

Despite upholding the state's authority to maintain "separate but equal" public schools, the lower court in Kansas did stipulate that segregation had a detrimental affect upon children. This conclusion was based upon social science research that was conducted by Kenneth Clark. His research showed that segregation produced feelings of inferiority and humiliation in black children. This loss of self-esteem, according to Dr. Clark, was responsible for frustration that could lead to anti-social behavior. The research also indicated that segregation had a negative affect upon white children. By promoting suspicion rather than communication, it was argued that segregation created feelings of distrust and hostility between the two races.

All five of the cases eventually reached the Supreme Court on appeal but, unlike previous cases, the Court was not being asked to examine separate facilities to determine if they were essentially equal. In 1954 the Court had to decide if the maintenance of separate, but otherwise equal facilities was itself a violation of the equal protection clause of the Fourteenth Amendment. To this end, the NAACP lawyers echoed Justice Harlan's dissent in *Plessy* by claiming that segregation placed a "badge of inferiority" in the minds of the black children. The NAACP brief, rather than calling for immediate relief, however, requested that desegregation be accomplished within a reasonable span of time, under the supervision of the judicial branch.

The team of lawyers representing the four states was headed by John W. Davis, who had been a candidate for the presidency in 1924. The states argued that previous rulings concerning the operation of graduate schools had affected a relatively small number of people, but a ruling on the segregation of elementary and secondary schools could prove to be a severe disruption of the social order in a number of states. The states also pointed to evidence that the conditions in the separate school systems were being equalized. Finally, the argument was advanced that education was not mentioned in the body of the Constitution. In our federal system of government, the Tenth Amendment guarantees that powers not delegated to the national government by the Constitution are "reserved" to the states. The authority to establish and maintain public schools is therefore a state concern and, Davis and his cohorts argued, the states should be free from unnecessary interference by the federal courts. The results of sociological research could be debated, they asserted, but constitutional principles and judicial precedents had left public schools in the hands of state and local officials.

LESSON 13: DECISION

Some Supreme Court rulings are universally recognized as being landmark decisions. *Marbury v. Madison* (1803) provided the classic justification for judicial review, and *McCulloch v. Maryland* (1819) helped to define the importance of the supremacy clause. *Gitlow v. New York* (1925) marked the beginning of a series of cases that would establish the incorporation doctrine, and *Baker v. Carr* (1962) required reapportionment to guarantee the principle of "one person, one vote." The Court's decision in *Brown v. Board of Education of Topeka* (1954) also ranks in the upper echelon of landmark constitutional rulings.

The Court ruled unanimously in Brown that the operation of segregated public schools was an unconstitutional violation of the equal protection clause of the Fourteenth Amendment. The opinion was written by Chief Justice Earl Warren, who only recently had been appointed to the Supreme Court. Warren's opinion, a mere thirteen paragraphs in length, was remarkable for its brilliant simplicity.

The Court examined the original intent of the Fourteenth Amendment and determined that the historical evidence was inconclusive when applied to the issue of school segregation. Warren explained the Court's predicament when he wrote:

> *In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when* ***Plessy v. Ferguson*** *was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.*

In this light, Chief Justice Warren asserted that "education is perhaps the most important function of state and local governments." Warren tied the importance of education to the requirements of the equal protection clause when he declared:

> *In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*

Having stated his position on the significance of education, Warren asked and answered the fundamental question posed in *Brown v. Board of Education of Topeka*:

> *Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunity? We believe that it does.*

The opinion cited the relevance of "intangible considerations" that had been delineated in the *Sweatt* and *McLaurin* decisions that were rendered in 1950, but it was the sociological research quoted in the lower court decision that had the most profound influence upon Warren's concise opinion. The Chief Justice echoed the conclusions reached by Dr. Clark when he wrote the following about the detrimental effect of segregation upon minority children:

> *To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.*

In a vigorous rejection of the Plessy precedent, Warren concluded that "in the filed of public education, the doctrine of 'separate but equal' has no place." He went on to state that separate educational facilities are "inherently unequal" and, as a result, segregation deprives children of equal protection of the laws.

Chief Justice Warren knew that a unanimous opinion in the school desegregation case was vital. He was concerned that a divided Court would only invite public debate and resistance that would ultimately make acceptance of the decision more tenuous. In 1955, the Court actually restored the *Brown* case to the docket (titled *Brown* II) to determine the most effective way for the decision to be implemented. As a result, the Court supplemented its landmark ruling on school segregation by asserting that the burden was on the states to comply "at the earliest practicable date." School desegregation was to proceed "with all deliberate speed."

Despite the Court's unanimity, and its decree that compliance was to be gradual rather than immediate, the Brown decision was met with fervent opposition in many parts of the nation. Much of the defiance was politically orchestrated. For example, in 1956 over one hundred Congressmen from Southern and border states signed a document that has come to be known as the "Southern Manifesto." The Congressmen accused the Supreme Court justices of having substituted "naked power for established law." They denounced the *Brown* decision as an encroachment upon the reserved powers of the states, and as an attempt by the judicial branch to "legislate" in violation of the separation of powers ideal articulated in the Constitution. The ruling was thus condemned as a "clear abuse of judicial power."

Southern governors like Ross Barnett in Mississippi, Orville Faubus in Arkansas, and George Wallace in Alabama stridently adopted segregationist poses that only exacerbated the situation in the South. Animosity turned to intransigence and by 1964, a full decade after the Brown decision was announced, less than two percent of the black students in the former Confederate states were attending desegregated schools.

On the positive side of the ledger, the struggle to desegregate the public schools continued, and *Brown v. Board of Education of Topeka* (1954) was cited as a precedent in a number of cases that contributed to the elimination of segregation in areas other than public education. The *Brown* decision also helped to ignite the civil rights movement that profoundly changed America. Thurgood Marshall, who successfully argued the case for the NAACP and the children that the organization was representing, became, in 1967, the first black justice to serve on the Supreme Court.

LESSON 13: FOLLOW-UP DISCUSSION QUESTIONS

1. What did Chief Justice Warren mean when he wrote that separate educational facilities are "inherently unequal"?

2. Why did Chief Justice Warren consider it important to issue a unanimous decision for the school desegregation case?

3. Would it have been better for the Court to have ordered immediate compliance with the school desegregation decision rather than gradual compliance? Did the Court invite resistance to the ruling by ordering that compliance could be gradual?

4. The Court was criticized for relying so heavily upon sociological research on the effects of segregation. Was this criticism valid?

5. Is it proper for Congressmen to openly denounce a Supreme Court decision as was done in the "Southern Manifesto?"

6. The Court was accused of "legislating from the bench" when the *Brown* decision was rendered. Was this accusation valid? Would it have been difficult for either the legislative branch or the executive branch to have taken a strong stance in favor of school desegregation prior to 1954?

7. Authority over public schools is held by the various states, and the Supreme Court's order to desegregate the schools was called "unnecessary interference" by some. Was this criticism valid? Is it possible to enforce the stipulations contained in the Fourteenth Amendment without violating the reserved powers doctrine contained in the Tenth Amendment?

LESSON FOURTEEN

Case: *San Antonio Independent School District v. Rodriguez*, 1973 (411 U.S. 1; 93 S.Ct. 1278).

Issue: Does a state violate the equal protection clause of the Fourteenth Amendment when it maintains a public school funding system that produces significantly unequal per pupil expenditures from one district to the next?

Objectives: At the conclusion of the lesson students should be able to:

1. discuss whether or not the poor, as a group, are discriminated against to a degree that requires their being categorized a suspect class;
2. discuss whether or not the opportunity to obtain an education is a fundamental right;
3. consider the advantages and the disadvantages of maintaining public schools under the direction of state and local officials;
4. suggest ways to finance public schools that are both equitable and constitutional;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 14: BACKGROUND AND FACTS

In 1968, Demetrio Rodriguez was concerned that his children were attending a school that was simply not preparing them to eventually compete for good jobs. Rodriguez was a military veteran who worked at an Air Force base near San Antonio, Texas. He had three sons who were attending an elementary school in the Edgewood School District in San Antonio. The school building was in desperate need of repairs, the classrooms lacked basic supplies, and almost half of the teachers were not certified and were employed only as a result of emergency permits. This school was but one of the twenty-five elementary and secondary schools in the Edgewood District. Over 22,000 students were enrolled in these schools. The population in the district was predominately Mexican-American and school records listed 90% of the students as Hispanic, and 6% were listed as black.

Rodriguez, in an effort to improve the schools, helped form the Edgewood District Concerned Parents Association. The group met with the district superintendent, but he informed the parents that the district lacked the money that would be needed to satisfy their demands. Rather than conceding defeat, the concerned parents took their complaints to Arthur Gochman, a notable civil rights attorney in San Antonio.

After accepting the group's case, Gochman identified the Texas system of school funding as the source of the problem. Like most states, Texas law required a local school district to rely heavily upon property tax revenue collected from within the district. As a result, a district rich in taxable property could levy taxes at a relatively low rate and still accumulate more money on a per pupil basis than a poor district where the average property value was much lower. This equation remained true even when the poor district assessed a higher property tax rate.

The San Antonio public school system included seven individual districts. To illustrate the inherent inequality of the Texas school funding formula, Gochman compared the Edgewood School District to the Alamo Heights School District. Edgewood was the poorest district in the San Antonio area, while Alamo Heights was the most affluent of the city's seven districts. Gochman's examination revealed that the median family income in the Edgewood district was $4,686, the lowest in the San Antonio area. The property in the district was taxed at a rate of $1.05 for every $100 of assessed property value. For the 1967-1968 school year, the district provided $26 per pupil, the state contributed $222 per pupil, and the federal government contributed $108 per pupil. As a result, the Edgewood School District could expend $356 per student.

The Alamo Heights School District was located in a predominantly white section of the city. The median family income was $8,001, the highest in the San Antonio area. The property in the district was taxed at a rate of $.85 for every $100 of assessed property value. For the 1967-1968 school year, the district provided $333 per pupil, the state contributed $225 per pupil, and the federal government contributed $36 per pupil. The Alamo Heights School District could therefore expend $594 per student. This figure meant that the Alamo Heights district could spend almost 70% more money on the education of each of the 5,000 students enrolled in the district's six schools than was being spent on a per pupil basis in the Edgewood district.

The figures disclosed that the residents of the Edgewood district could only have matched the property tax revenue collected in the wealthier district by paying the exorbitantly high rate of $13.00 for every $100 of assessed property value. This would have been a rate twenty times higher than the rate in Alamo Heights, which was the lowest in the San Antonio area. State law set the property tax ceiling at a rate of $1.50, so it would have been impossible for the Edgewood residents to have matched the Alamo Heights figure even if they were willing to make that kind of sacrifice. Actually, the property tax rate in the district was already the highest in the area, but Edgewood's relatively low property tax base placed the district's school children at a fiscal disadvantage when compared to other students in San Antonio.

Texas, at this time, had approximately 1,000 local school districts, and a study showed that the wealthiest districts were able to spend about three times as much money per student as the poorest districts. This fact would seem to contradict the opinion rendered over a decade earlier in *Brown v. Board of Education of Topeka* (1954). In *Brown*, Chief Justice Earl Warren wrote that education, as "the very foundation of good citizenship", is "perhaps the most important function of state and local governments." Warren also asserted that whenever a state provides its residents with the opportunity to obtain an education, it "is a right which must be made available to all on equal terms."

On July 10, 1968 Gochman filed a class action suit in federal court on behalf of seven parents from the Edgewood School District. Demetrio Rodriguez was the first individual listed in the complaint that alleged the inequitable Texas school financing system provided the Edgewood children with an inferior education. Gochman believed that the statistical evidence, along with testimony from experts on school financing, would produce a victory in court.

The suit itself made two claims based upon constitutional principles. First, education was presented as a "fundamental right" which must be provided on an equal basis to be consistent with the equal protection clause of the Fourteenth Amendment. In *Palko v. Connecticut* (1937), Justice Benjamin Cardozo declared that fundamental rights are in a "preferred position" which requires the courts to examine any possible violation of such rights, with what he called "strict scrutiny." The Bill of Rights includes a number of rights traditionally regarded as fundamental, including freedom of speech, freedom of religion, and procedural due process rights. Other rights, such as the right to vote and access to the courts, have consistently been viewed as fundamental even though they were not explicitly listed in either the original text of the Constitution or the Bill of Rights.

The second constitutional claim advanced in the parents' suit was that poor families compose a "suspect class" that is entitled to a higher level of judicial protection to guard against discrimination. The existence of suspect classifications was recognized by the Supreme Court in *Korematsu v. United States* (1944). In *Korematsu*, Justice Hugo Black stated that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect." The Court announced that racial classifications must be subjected to "rigid scrutiny" but, ironically, in *Korematsu* the Court ruled that the internment of American citizens of Japanese ancestry during World War II was not a denial of equal protection of the laws. In addition to race other factors, such as gender and age, have been considered suspect classifications within the framework of the Fourteenth Amendment.

The federal district court ruled that the state failed to present a compelling reason to justify the school funding system that relied upon local property taxes. The three judge panel accepted the contention that poor families constitute a suspect class. The Court also asserted that the Edgewood families had a fundamental right to an education, and that the disparity that existed in per pupil expenditures from one district to another was an abrogation of the equal protection clause of the Fourteenth Amendment. The state was given two years to reform the inequitable funding system, but Texas officials appealed the lower court decision to the United States Supreme Court in an effort to maintain the status quo.

Before the nation's highest court the lawyers representing the state of Texas admitted that the public school funding system was less than perfect, but the system was defended as the most rational way to provide each child in the state with a minimum basic education. The lower court ruling, it was argued, would impose a "constitutional straight jacket" on the state.

The state held that the authority to establish and maintain a public school system is one of the powers reserved to the states under the Tenth Amendment. Accordingly, the ruling issued by the district court was portrayed as an intrusion by the federal judiciary into a matter that is properly decided at the state and local level. Proponents of local control over public education argued that it was the most efficient way to formulate policies that would benefit the students and their families. The lawyers representing Texas were diplomatically asking the Court to exercise more than just a modicum of judicial restraint by allowing the issue to be settled by the state legislature. Twenty-five states filed amicus curiae ("friend of the court") briefs in support of the Texas school funding system.

Conversely, only one state, Minnesota, supported the argument filed by Rodriguez and the other parents. However, the suit was supported by the American Civil Liberties Union, the National Association for the Advancement of Colored People, and the National Education Association. Strangely, a brief supporting the lower court decision was filed by the San Antonio Independent School District which was listed as the party appealing that very decision to the Supreme Court. Of course, the suit was actually being advanced by the State of Texas, and the school district was only nominally listed as the appellant.

Despite the fact that the Constitution is silent on the topic of education, it was argued that education is a fundamental right because it is indissolubly linked to a person's participation in the political process and to the full exercise of a number of rights listed in the Bill of Rights.

Concerning the contention that those living in poverty constitute a suspect class, it was argued that discrimination, even if not intentional, was still an irrefutable consequence of a funding system based upon property values. The poorest people normally live in the poorest districts, and the Texas formula which tied school financing to property value was said to favor the more affluent in violation of the equal protection clause.

LESSON 14: DECISION

In *San Antonio Independent School District v. Rodriguez* (1973), a sharply divided Supreme Court reversed the lower court decision. Thereby, the Court restored the constitutionality of the Texas school funding system, with its reliance upon property tax revenue collected from the residents of local school districts. The significance of the ruling was augmented by the pronouncements that the poor were not a suspect class, and education was not a fundamental rights under the Constitution. The Court voted 5-4 in *Rodriguez*, and the majority opinion was written by Justice Lewis Powell.

Justice Powell succinctly established the "framework" for the Court's decision when he wrote:

> *We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.*

Justice Powell reasoned that if any group was disadvantaged by the Texas school funding system it was "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts." Correspondingly, Powell was unable to recognize the poor as a suspect class. He provided the following analysis:

> *The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.*

Concerning the status of educational opportunity as a fundamental right, Justice Powell stressed that education is neither explicitly nor even implicitly afforded protection by the Constitution. Powell countered the noted declaration from the *Brown* decision, that "education is perhaps the most important function of state and local governments", with his own observation that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental."

Justice Powell also rejected the contention that education is a fundamental right because it is essential to an effective exercise of First Amendment freedoms and an intelligent use of the right to vote. Powell's sardonic response to this idea was "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice."

Having dismissed both the suspect class and the fundamental right arguments, Justice Powell turned his attention to whether the Texas formula was rational enough to avoid violating the equal protection clause. He recited a number of reasons why a state should be afforded an inordinate amount of flexibility in the maintenance of its public school system. Powell recognized that this was an area where the Supreme Court "has traditionally deferred to state legislatures." Regarding any interference with the state's imposition of taxes to support the operation of a public school system, Powell cautioned that Supreme Court justices "lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues."

There was both a constitutional and a practical reason for Powell's hesitancy to tamper with the Texas system. A cornerstone of constitutional government in the United States is the federal system that divides power between the national government and the states. Pragmatically, the justices had to consider the consequences of a decision that would affect the operation of government in states all across the nation. Powell speculated that "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State."

For Justice Powell, any deprivation inflicted by the Texas system was relative, not absolute. He wrote:

> *The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.*

Powell accepted the argument presented by the state of Texas that it was able to provide an "adequate" education for all the children in the state. In the end, a narrow majority of the justices ruled that the Texas system was neither irrational nor invidiously discriminatory. However, Powell was quick to add that the Court's decision was not to be interpreted "as placing its judicial imprimatur on the status quo." Powell's suggestion was for state legislatures to reform funding systems that "have relied too long and too heavily on the local property tax." This suggestion followed Powell's observation that the Texas system, though rational, did produce "substantial disparities" from district to district.

A long and scathing dissent was written by Justice Thurgood Marshall in *San Antonio Independent School District v. Rodriguez* (1973). Two decades earlier Marshall had been the principal litigator for the NAACP in the famous *Brown* case. His dissent in *Rodriguez* relied heavily upon Chief Justice Earl Warren's opinion in *Brown*. Specifically, Marshall echoed Warren's pronouncement that "education is perhaps the most important function of state and local governments", in part, because education is the "foundation of good citizenship." Of equal importance was Warren's conclusion that once a state creates a public school system, the opportunity to obtain an education "is a right which must be made available to all on equal terms." Marshall's concern in *Rodriguez* was that "the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity."

Marshall argued that a right does not have to be explicitly or implicitly stated in the Constitution to be considered "fundamental." He cited the right to vote as a prime example of such a right. Marshall held that the right to an education is fundamental because it "directly affects" a person's ability to exercise his or her First Amendment rights and to participate in the political process.

Concerning the majority's conclusion that the poor do not constitute a suspect class, Marshall conceded that poverty is not a permanent disability due to the fact "its shackles may be escaped." However, Marshall asserted that "poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups." Contrary to the majority, Marshall maintained that discrimination on the basis of group wealth requires "careful judicial scrutiny." Marshall caustically called the Texas school funding formula a "sham" that perpetuated discrimination in educational opportunity.

Justice Marshall was skeptical of the majority's suggestion that the residents of the Edgewood School District could find a remedy for this discrimination in what he called "the vagaries of the political process." Marshall could not foresee the Texas legislature significantly altering its discriminatory system due to the "the vested interests of the wealthy school districts in the preservation of the status quo."

Marshall also challenged Justice Powell's assertion that since all students in Texas were guaranteed an education that provided "basic minimal skills", any deprivation was therefore relative and not absolute. Justice Marshall countered that the equal protection clause demands equity, not minimal standards or pledges to provide what is "adequate." Marshall addressed the observation that some experts question the correlation between spending and the quality of education by noting that more money allows a school to provide a wider spectrum of services and curriculum alternatives.

Following the Court's decision in 1973, Demetrio Rodriguez remarked: "The poor people have lost again." However, twelve years later Rodriguez joined a suit that challenged the Texas school funding system under the state constitution. In the years following the Supreme Court's *Rodriguez* decision the courts in six states ruled that their respective state constitutions prohibited school funding plans based upon the collection of property taxes that produced what were judged to be unacceptable inequities. Unlike the United States Constitution, state constitutions commonly establish clear guidelines for the establishment and maintenance of a public school system. In 1987 the Texas judiciary ruled that the Texas constitution prohibited the continuance of the school funding system that Rodriguez and the other Edgewood parents had originally challenged in a suit that had been filed in a federal court in 1968. It had taken almost twenty years, but Demetrio Rodriguez finally came out on top.

LESSON 14: FOLLOW-UP DISCUSSION QUESTIONS

1. The Supreme Court ruled that the poor do not constitute a suspect class. Do you think that the poor, as a group, are discriminated against?

2. The Court ruled that the opportunity for an education is not a fundamental right. Do you agree?

3. Would you favor the establishment of a single, national education system? Should public schools continue to be operated by local authorities under the direction of the state?

4. Is there a direct correlation between the amount of money spent per pupil and the quality of education?

5. Is it acceptable for a state to guarantee that every student will receive an "adequate" education, even though some districts are able to expend much more money per pupil, as Justice Powell asserted? Should a state strive to attain equity in per pupil expenditures from one district to the next as Justice Marshall asserted?

6. Justice Powell considered the practical consequences associated with a ruling that would have required virtually every state to radically change the manner in which its public schools were funded. Was this a valid concern for the Supreme Court? Should the justices base their decisions solely on the dictates of the Constitution?

7. Does your state constitution contain provisions on the operation of a public school system? Can you suggest a way to finance public schools in your state that would be both fair and constitutional?

LESSON FIFTEEN

Case: *Runyon v. McCrary*, 1976 (427 U.S. 160; 96 S.Ct. 2586).

Issue: Can a private school practice racial discrimination by refusing to admit qualified minority children?

Objectives: At the conclusion of the lesson students should be able to:

1. distinguish between private acts of discrimination and a state action that promotes discrimination;
2. consider if and when it is appropriate for the government to prohibit private acts of discrimination;
3. discuss whether or not a private school's discriminatory admission policy is protected by the right of privacy or freedom of association;
4. consider whether or not the government can require a private individual or group to enter a legally binding contract;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 15: BACKGROUND AND FACTS

In the famous *Brown* v. *Board of Education of Topeka* (1954) decision, Chief Justice Earl Warren wrote:

> *We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.*

In *Brown*, the Supreme Court ruled that school segregation violated the equal protection clause of the Fourteenth Amendment. The decision was limited to public schools, however, because the 14th Amendment specifically states:

> *[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Since the majority of students in the United States attend public schools, *Brown* was a landmark decision. On the other hand, private schools remained free to discriminate because the equal protection clause had not been interpreted to prohibit private acts of discrimination.

The Supreme Court has found ways to examine private acts of discrimination without invoking the equal protection clause. For example, in *Jones* v. *Alfred H. Mayer Co.* (1968), it was alleged that a private company had refused to sell a home to an individual solely because he was an African-American. The suit was based on a surviving remnant of the Civil Rights Act of 1866 which, as incorporated into the United States Code, guaranteed that individuals have an equal right to purchase property. The Supreme Court examined the Thirteenth Amendment, which abolished slavery, and discovered the second section of the amendment granted Congress the "power to enforce this article by appropriate legislation." In the eyes of the Supreme Court it was both appropriate and constitutional for Congress to abolish all "badges and incidents" of slavery, including discriminatory practices in the sale of housing. Similarly, in *Johnson* v. *Railway Express Agency, Inc.* (1974), the Court ruled that another surviving portion of the Civil Rights Act of 1866, one that was designed to prohibit discrimination by private employers, was also constitutional.

In *Moose Lodge No. 107* v. *Irvis* (1972), the Supreme Court did consider the applicability of the Fourteenth Amendment's equal protection clause to private acts of discrimination. In this case an African-American member of the Pennsylvania state legislature, who was the guest of a member, was refused service by the Moose Lodge in Harrisburg. It was alleged that since the state had issued a liquor license to the private fraternal organization, this incident of racial discrimination constituted a violation of the equal protection clause.

The Court ruled that the state had not directly sanctioned or encouraged discrimination by the issuance of a liquor license. A common benefit or service was not seen as being the equivalent of a "state action" that would require an interpretation of the Fourteenth Amendment. Invidious acts by private clubs were therefore considered to be outside the parameters of constitutional protection.

In *Norwood* v. *Harrison* (1973), the Supreme Court did rule that it was impermissible for Mississippi to lend textbooks to private schools that discriminated on the basis of race. Lending textbooks, unlike the issuance of a liquor license, was seen as direct state aid that in this case was in violation of the equal protection clause. Three years later the Court would take a closer look at the practice of racial discrimination by a private school.

The case, *Runyon* v. *McCrary* (1976), involved two private, commercially operated, nonsectarian schools in Virginia. Bobbe's School in Arlington was operated by Russell and Katheryne Runyon. The school opened in 1958 with an initial enrollment of five students, but by 1972 it had 200 students. In 1967 Bobbe's School started a summer day camp that averaged about one hundred children per year. The other school, the Fairfax-Brewster School in Fairfax County, opened in 1955 and 223 students were enrolled during the 1972-1973 school year. The Fairfax-Brewster School initiated a summer day camp in 1956, and 236 children attended in 1972. Neither school had ever accepted an African-American child.

Runyon v. *McCrary* also involved two African-American children, Michael McCrary and Colin Gonzales. In May of 1969, Mr. and Mrs. Gonzales, the parents of Colin, telephoned and visited the Fairfax-Brewster School. They had received a mailed brochure addressed to "resident" in addition to reading the school's advertisement in the yellow pages of the phone directory. After the visit they submitted an application for Colin's admission to the school's day camp. The school responded with a form letter that simply stated that the school would be unable to "accommodate" Colin's application. Subsequently, Mr. Gonzales telephoned the school's chairman of the board who stated that the application had been rejected due to the fact that the school was not integrated.

The Gonzales family had also received a brochure addressed to "resident" from Bobbe's School. Mr. Gonzales telephone the school to inquire about its admission policy. He was told that only members of the Caucasian race were admitted to the school. In August of 1972 the mother of Michael McCrary telephoned Bobbe's school after reading its advertisement in the telephone book. After inquiring about nursery school facilities for her son, Mrs. McCrary asked if the school was integrated. The answer was no.

The parents of Michael McCrary and Colin Gonzales filed a class action suit in a federal district court alleging that their children had been denied admission to the schools in question in violation of Title 42, Section 1981 of the United States Code. This particular statute, a surviving remnant of the Civil Rights Act of 1866, states that all persons shall enjoy the same right to make and enforce a contract. The parents' complaint was obviously relying heavily upon the precedent established by *Jones* v. *Alfred H. Mayer Co.* (1968).

The school argued that an enforcement of the code would violate the constitutionally protected rights of free association and privacy, and the parental right to direct a child's education. The Supreme Court has recognized freedom of association as an undefined fundamental right that is based upon the guarantee of the "right of the people peaceably to assemble" which is contained in the First Amendment.

The right of privacy is also not clearly defined in the Constitution. In addition, it is virtually impossible to point to a particular case, or even series of cases, that clarifies the Supreme Court's concept of privacy. Legal scholars generally cite *Griswold* v. *Connecticut* (1965) as the beginning of the Court's recognition that there is a constitutional right of privacy. Theoretically, one could argue that the U.S. Constitution, which is an instrument for the maintenance of a limited government, requires the existence of a zone of individual privacy. Constitutional provisions such as the Fourth Amendment protection against unreasonable searches and the Fifth Amendment safeguard against self-incrimination, not to mention the guarantees listed in the First Amendment, can be seen as examples of the Framers' effort to ensure an area of individual privacy.

The district court and a federal court of appeals both ruled in favor of the parents. To reach a decision in *Runyon* v. *McCrary*, the Supreme Court would have to resolve two main issues: (1) does the pertinent section of the U.S. Code prohibit private, commercially operated, nonsectarian schools from denying admission to prospective students solely on the basis of their race; and (2) if so, is this particular law constitutional?

LESSON 15: DECISION

In *Runyon* v. *McCrary* (1976), the Supreme Court affirmed the lower court decisions by ruling in favor of the parents. The vote was 7-2, with the majority opinion written by Justice Stewart and a dissenting opinion by Justice White.

Justice Stewart opened his opinion by emphasizing that the *Runyon* case did not concern the right of private social organizations to discriminate in their membership for racial or other reasons, the right of a private school to limit its student body to exclusively boys or girls or members of a particular religious faith, or the right of a private sectarian school to practice racial discrimination for an alleged religious reason. In other words, the Runyon decision was not intended to be a vehicle for the Court to announce an expansive interpretation of the Fourteenth Amendment's equal protection clause that would bar private acts of discrimination. Instead, *Runyon* followed the Court's reasoning in *Jones* v. *Alfred H. Mayer Co.* (1968) and *Johnson* v. *Railway Express Agency, Inc.* (1974). As in these two previous cases, the Court in *Runyon* favored the view that the enforcement clause of the Thirteenth Amendment provides Congress with the authority to comprehensively eradicate the "badges and incidents" of slavery. Concerning the parents of Michael McCrary and Colin Gonzales, this meant that Congress has the power to enact a statute that protects the right of every individual, regardless of his or her race, to enter a contract.

The majority in *Runyon* considered it important that both schools attempted to attract students via bulk mailings and advertisements in the telephone book. As Justice Stewart wrote:

> *The educational services of Bobbe's school and the Fairfax-Brewster School were advertised and offered to members of the general public. But neither school offered services on an equal basis to white and nonwhite students.*

Justice Steward addressed the specific claims that had been made by the representatives of the two schools. Concerning whether or not the statute violated the right to freedom of association, Stewart wrote:

> *[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.*

The second contention by the appellants in *Runyon* was that the statute was a violation of the right of privacy. On this subject Justice Stewart offered the following:

> *The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.*

Finally, it was alleged that the statute would interfere with a parent's right to direct the education of his or her children. The majority in *Runyon* reasoned that since the statute did not restrict the right of parents to send their children to a particular private school rather than any other school, the claim was invalid.

A concurring opinion in *Runyon* v. *McCrary* was written by Justice Stevens. He sarcastically remarked that the contemporary construction of the Civil Rights Act of 1866 "would have amazed the legislators who voted for it." However, despite the fact that Stevens believed *Jones* v. *Alfred H. Mayer Co.* was wrongly decided, he feared that a ruling in favor of the two private schools in *Runyon* would be interpreted as a decision in favor of racial discrimination. As Stevens wrote:

> *For the court now to overrule* **Jones** *would be a significant step backwards, with effects that would not have arisen from a correct decision in the first instance.*

Justice White examined the nature of a legal contract and decided that the majority in *Runyon* had overstepped the boundaries of judicial authority. Writing in dissent, White reasoned that when the Civil Rights Act of 1866 was enacted no person, white or otherwise, had the right to make a contract with an unwilling private person. Generally, a valid contract required two willing parties.

White's analysis led him to the following conclusion:

> *The right to make contracts, enjoyed by white citizens, was therefore always a right to enter into binding agreements only with willing second parties. Since the statute only gives Negroes the 'same rights' to contract as is enjoyed by whites, the language of the statute confers no right on Negroes to enter into a contract with an unwilling person no matter what that person's motivation for refusing to contract.*

When Justice White applied his reading of the Civil Rights Act of 1866 to the dispute in *Runyon* he determined that the schools' racially motivated decision not to contract with the African-American parents, though repugnant, was insufficient to supply those parents with a legal cause of action. This particular avenue of legal reasoning adheres to the idea that whenever possible jurists should examine and follow the original intent of the statute in question.

LESSON 15: FOLLOW-UP DISCUSSION QUESTIONS

1. What is the difference between a private act of discrimination and a state action that causes or promotes discrimination?

2. Does the right of privacy or freedom of association protect the right of a private school to implement discriminatory policies?

3. Should private schools be free to "promote the belief that racial segregation is desirable" as Justice Stewart wrote?

4. Should a private club be free to follow a discriminatory membership policy?

5. Should private sectarian schools be allowed to practice racial discrimination for alleged religious reasons?

6. Should private schools be allowed to practice gender discrimination by admitting only male or only female students?

7. Justice White, in dissent, argued that a contract requires two willing parties. Do you agree or disagree that the government can compel a private individual or group to enter a contract?

LESSON SIXTEEN

Case: *Plyler v. Doe*, 1982 (457 U.S. 202; 102 S.Ct. 2382).

Issue: Does the equal protection clause of the Fourteenth Amendment require a state to provide illegal aliens with a a free public school education?

Objections: At the conclusion of the lesson students should be able to:

1. discuss the on-going issue of immigration in the development of the United States as a nation;
2. analyze the rights of illegal aliens under the equal protection clause of the Constitution;
3. consider the limitations that a federal system places upon judicial activism;
4. discuss when a decision by the Supreme Court is a transgression of the Constitution's requirement of a separation of powers;
5. analyze a conflict within the framework of the U.S. Constitution; and
6. form and defend an opinion based upon constitutional provisions and legal precedents.

LESSON 16: BACKGROUND AND FACTS

The United States has been called a nation of immigrants. Paradoxically, in this country frequently portrayed as a refuge for the oppressed and the persecuted, cultural differences have often been met with feelings of suspicion and hostility. The impact of anti-immigration movements is evident in American history. For example, in 1892 Congress capitulated to nativist sentiments with the enactment of the Chinese Exclusion Act. At the time, Chinese immigrants represented about ten percent of the population of California. Thousands of Chinese had emigrated to the Pacific Coast decades earlier to work in mines and to help construct railroads. The 1892 law made Chinese residents ineligible for citizenship, and suspended immigration from China for ten years.

Nativism was strong following World War I, and during the 1920's Congress adopted a quota system designed to limit the number of immigrants from eastern and southern Europe. The quota from a particular nation was based upon the number of people in the United States from that foreign nation according to the 1890 census. In 1924, the number of immigrants was reduced to 164,000 per year and Asians were excluded entirely.

In 1981 the Attorney General estimated that the number of illegal aliens within the United States to be between three and six million people. A large percentage of these illegal aliens had entered the United States by crossing the nation's extensive southern border with Mexico. One such individual was a Mexican father of four young children. In litigation that would eventually reach the United States Supreme Court he was identified by the pseudonym "Jose Doe."

Jose had entered the United States illegally by crossing the Rio Grande River into Texas. He initially worked in San Antonio and later found employment in a foundry in Tyler, Texas. His primary objective was to establish a better economic future for his family than was possible in Mexico. Consistent with this desire, Jose succeeded in bringing his wife and four children into the United States in 1973. His family members were also illegal aliens.

Jose had no idea that his children were eligible to attend public school. He was informed of this opportunity by the coordinator of a church sponsored program established to aid Mexican-Americans in Tyler. Subsequently, his son Alfredo and his daughter Viviola were enrolled in the first and second grades, respectively. Jose's two oldest children thus became students in a school system that had a total enrollment of approximately 16,000 children.

In 1975, however, the Texas legislature enacted a law that prohibited the state from providing financial reimbursement to local school districts for the education of any child not "legally admitted" to the United States. School districts were also authorized to deny the enrollment of any such child. Tyler, a city about 400 miles from the Mexican border, was estimated to have had only about eighteen illegal aliens enrolled in its public schools during the 1975-1976 school year. The public schools in Tyler therefore continued to admit children regardless of their immigration status.

During the 1976-1977 school year the number of undocumented aliens in the Tyler public schools increased to about 27 or 28 children, including Alfredo and Viviola. In July, 1977 the school board for the Tyler Independent School District adopted a policy that required the payment of the "full tuition fee" for the enrollment of any child who was an illegal alien. This fee was set at $1,000 which was estimated to be the average cost of a year's schooling in Tyler. The state law had not fully defined the meaning of "legally admitted" so the school board interpreted the term to mean an individual who could provide either documentation that he or she was legally in the United States, or a statement from the U.S. Immigration Service that verified the person was in the process of being properly admitted to the nation.

When the school year opened, the administrators in the various public schools in Tyler were uncertain about how to implement the school board's directive. One family with two children attending separate schools, had one child accepted while the other was not. There was evidence that a number of children were excluded from schools simply because they spoke Spanish and were poorly dressed.

The coordinator of the program that was founded to assist the people of Mexican ancestry in Tyler was able to locate four families who were willing to join a class action suit filed to challenge the new school board policy. Since the litigants were illegal aliens, the surnames Doe, Loe, Moe, and Boe were used as pseudonyms in an effort to protect their true identities. However, after the suit was filed in a federal district court, the Justice Department was notified and there was a danger that the families would be deported.

The suit itself was an effort to secure an injunction that would prevent the school board from excluding the illegal alien children. The parents who were party to the suit were required to testify in court that they paid taxes and that their children were nonetheless excluded from school. Lawyers for the families claimed that the law and the school board policy were discriminatory, and thereby, in violation of the equal protection clause of the Fourteenth Amendment.

The class action suit was directed at James Plyler, the Superintendent of the Tyler Independent School District, but it was essentially the state of Texas that answered the complaint. The state defended the statute as a reasonable effort to reduce the number of illegal aliens who were entering Texas on a regular basis. It further argued that providing a public education for illegal aliens depleted the state's limited financial resources and detracted from the quality of education available to legal residents. It was the state's contention that the increase in the number of undocumented aliens placed a significant burden on the public schools due to the educational deficiencies of the children in question.

The District Court did not accept the state's efforts to justify the legislation, and a permanent injunction was granted which required the public schools to enroll children who were illegal aliens. The ruling asserted that both the state law and the school board policy lacked "either the purpose or the effect of keeping illegal aliens out of the State of Texas." The ruling also held that there was no evidence of an appreciable financial burden on the state. Children born in the United States are considered citizens, and the statistics revealed that the vast majority of children who were of Mexican ancestry were actually legal residents. The District Court speculated that children "already disadvantaged as a result of poverty, lack of English speaking ability, and undeniable racial prejudices", if further handicapped by the lack of an education, would "become permanently locked into the lowest socio-economic class." The ruling was eventually appealed to the United States Supreme Court.

Before the Supreme Court, lawyers representing the state of Texas argued that under the Fourteenth Amendment the children in question were not entitled to the equal protection of the laws because, as illegal aliens, they were not legally within the jurisdiction of the state as is required by the amendment. Even if an illegal alien were to be considered a person within the scope of the equal protection clause, the state reasoned, illegal aliens had not been categorized a suspect class by the Supreme Court and education was ruled not to be a fundamental right in *San Antonio Independent School District v. Rodriguez* (1973). Therefore, the state declared that it merely had to demonstrate that the statute served a rational purpose.

In an effort to persuade the Court that the legislation was rational, or reasonable, the state reiterated the positions that had been advanced at the lower court level. The statute was defended as a necessary protection against an influx of illegal immigrants. The statute was also deemed necessary to preserve the state's limited financial resources for the education of lawful residents, especially in light of the distinctive burdens that children who are illegal aliens place upon the public schools.

In its brief for the Supreme Court the state added the argument that because their presence is unlawful, illegal aliens are less likely than other children to remain within the borders of the state and to put an education to an effective use there. Finally, the state cited the fact that non-citizens are not afforded the right to vote as a precedent demonstrating that the rights and privileges of citizenship are reasonably withheld from illegal aliens.

The lawyers representing Jose Doe and the other parents reminded the Court that illegal aliens are not, immune from income and social security taxes. They also asserted that the general welfare of the state and the nation was best served by educating children who were likely to become members of the society. As was stated in the District Court's opinion, the "illegal alien of today may be the legal alien of tomorrow." It was argued that illegal aliens are persons under the Fourteenth Amendment, and to condemn these children to a lifetime of illiteracy was clearly discriminatory. Whether or not the Texas statute was a violation of the equal protection clause was a decision that ultimately would be made by the Supreme Court.

LESSON 16: DECISION

In *Plyler v. Doe* (1982), the Supreme Court ruled that the statutory refusal by the state of Texas to reimburse local school districts for the education of illegal aliens was an unconstitutional violation of the equal protection clause of the Fourteenth Amendment. In addition to withholding state funds for the education of children who had not been "legally admitted" to the United States, the statute also authorized local school districts to refuse to enroll these children. The vote was 5-4, and the majority opinion was written by Justice William Brennan.

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The lawyers representing the state of Texas argued that undocumented aliens, because of their immigration status, were not "persons within the jurisdiction" of the state and, therefore, not entitled to equal protection of the laws. Justice Brennan opened his opinion by summarily dismissing this argument. He asserted that "even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Brennan reasoned that to allow a state to invoke the phrase "within its jurisdiction" to identify and exclude groups of people from the protective umbrella of the Fourteenth Amendment would undermine the principle of equal protection of the laws. He wrote:

> *Use of the phrase "within its jurisdiction" thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory.*

The more difficult question was whether the equal protection clause was violated by the state's refusal to reimburse local school districts for the education of children not "legally admitted" to the United States. Justice Brennan began his analysis of this issue by citing a pair of precedents established in *San Antonio Independent School District v. Rodriguez* (1973):

> *Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy". Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.*

The Court's recognition that illegal aliens do not constitute a suspect class, and that education is not a fundamental right, meant that Texas had but to demonstrate that the statute was rational. Brennan noted that the practical effect of the statute would be to mark "a discrete class of children not accountable for their disabling status" with the "stigma of illiteracy" for the rest of their lives. The discrimination contained in the statute could only be considered rational if there was countervailing evidence that the law promoted "some substantial goal" of the state. Justice Brennan then proceeded to examine the arguments presented by the state.

First, Texas argued that the statute was needed to protect the state from an influx of illegal immigrants. Brennan stated bluntly that there was no evidence of a significant burden on the state's economy that could be traced to the presence of illegal aliens. To the contrary, Brennan observed that "illegal aliens underutilize public services" while contributing their labor to the local economy and their tax dollars to the state. He added that the primary incentive for illegal entry into Texas was the availability of employment, not the opportunity for a free education.

Second, the exclusion of undocumented children from the state's public schools was defended because of the "special burdens" illegal aliens impose upon the state's ability to provide its residents with a quality education. Justice Brennan rejected this argument, noting that the undocumented children were "basically indistinguishable" from alien children who were legal residents. Therefore, the record failed to support the claim that the exclusion of undocumented children would improve the overall quality of education in Texas.

Finally, the state argued that a person's unlawful presence in the state meant that, when compared to lawful residents, it was less likely that the illegal alien would remain in the state to make an effective use of his or her education. Brennan's response was that even if this was a valid concern, the state "has no assurance that any child, citizen or not, will employ the education provided by the State within the con-

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fines of the State's borders." Justice Brennan then provided the following observation:

> *In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.*

Not surprisingly, Justice Brennan concluded that the state of Texas failed to demonstrate a "substantial state interest" that would justify allowing the law to stand.

Justice Brennan was mindful of the fact that an unsanctioned entry into the United States is a crime, and that a violator could subsequently be deported. However, Brennan recognized that the employment of undocumented aliens had resulted in the creation of a "shadow population" that included millions of people. He wrote:

> *This situation raises the specter of a permanent caste of undocumented residents aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.*

In *Plyler v. Doe*, Brennan's primary concern was for the undocumented children who he called "special members of this underclass." He conceded that a persuasive argument could be made in favor of withholding the benefits of citizenship "from those whose very presence within the United States is the product of their own unlawful conduct." On the other hand, Brennan reasoned that "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." Ultimately, the nation would suffer from the creation of this permanent underclass due to inability of the illiterate to realistically contribute to the progress of the United States. Justice Brennan articulated this view in the following passage:

> *Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual and psychological well-being of the individual, and the obstacle it poses to individual achievement, makes it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.*

As the one vote margin in *Plyler v. Doe* would imply, the Supreme Court was sharply divided over whether or not the Texas statute was rational and, therefore, constitutional. A strident dissent was written by Chief Justice Warren Burger. He agreed with the majority that an illegal alien was a "person within the jurisdiction" of a particular state and, thereby, within the scope of the Fourteenth Amendment's equal protection clause. However, the Chief Justice held that the equal protection clause "does not mandate identical treatment of different categories of persons." Having made this distinction, Burger argued that the Texas statute did indeed serve a rational purpose when he wrote:

> *By definition, illegal aliens have no right whatever to be here, and the State may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the States.*

Chief Justice Burger interpreted the primary purpose of the Texas statute to be the "conservation of finite state revenues." In his eyes, this was a legitimate goal given the state's need to prevent the "undue depletion of its limited revenues available for education, and to preserve the fiscal integrity of the State's school financing system against an ever increasing flood of illegal aliens—aliens over whose entry or continued presence it has no control." Burger noted that the federal government excluded illegal aliens from numerous social welfare programs, such as the food stamp program, the medicare and medicaid hospital insurance programs, and supplemental security income programs.

As a member of the Supreme Court, Burger voted to uphold the constitutionality of the Texas statute. Ironically, Burger admitted that he would vote against the measure had he been a member of the Texas legislature because "the long-range costs of excluding any children from the public schools may well outweigh the costs of educating them." His position, however, was that this choice rightfully, and constitutionally, belonged to the state legislature.

The strongest objection voiced by Chief Justice Burger was that the majority's ruling in *Plyler v. Doe* was "yet another example of unwarranted judicial action." He wrote the following call for judicial restraint:

> *Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language. However, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom", or "common sense". We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.*

Federalism and a separation of powers are two of the guiding principles of limited government in the United Stares, and Burger considered the majority's action in *Plyler v. Doe* to be a serious abrogation of both standards. In our federal system, individual state governments are vested with the authority to establish and maintain public schools. Burger thus viewed the Plyler decision as an unnecessary intrusion into a matter that was reasonably handled by the Texas legislature. Similarly, the Constitution mandates that Congress bears the primary responsibility "for addressing the problems occasioned by the millions of illegal aliens flooding across our southern border." When the Supreme Court attempts to do the job that rightfully belongs to Congress, Burger reasoned, it disregards the separation of powers doctrine. Chief Justice Burger cautioned against "legislating from the bench" because the Constitution "does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem."

LESSON 16: FOLLOW-UP DISCUSSION QUESTIONS

1. Why is the United States called a "nation of immigrants"? Has the nation lived up to this moniker in recent years?

2. Should prospective immigrants searching for economic opportunity be given the same consideration as an alien seeking political asylum? When is it reasonable to prevent aliens from entering the nation?

3. Should employers of illegal aliens be punished? Should the aliens be deported if they were encouraged to enter the nation by the employer?

4. If you had been a member of the Texas legislature would you have voted for or against the bill that prohibited the reimbursement of local school districts for the education of illegal aliens?

5. Justice Brennan, in the majority opinion in *Plyler v. Doe* (1982), declared that the state's concern for the preservation of financial resources was not a sufficient justification for its effort to exclude illegal aliens from the public schools. Is it proper for the Supreme Court to dictate how a state is to allocate its tax revenue?

6. In dissent, Chief Justice Burger called the majority's ruling in *Plyler* "yet another example of unwarranted judicial action." Why did he feel this way? Was Burger correct? Why or why not?

7. As a member of the Supreme Court Chief Justice Burger voted to uphold the constitutionality of the Texas statute. However, if he had been a member of the Texas legislature, he stated that he would have voted against the bill. Is there a rationale behind this apparent inconsistency? If so, what is it? And, do you agree or disagree with it?

VI

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VII

SELECT ANNOTATED BIBLIOGRAPHY FROM THE ERIC DATABASE

by Vickie J. Schlene

The documents and journal articles in the following annotated bibliography can be obtained through ERIC. These items in the ERIC database can be recognized by the ED and EJ numbers that are printed at the end of the citations in the following list.

What is ERIC? How can materials in the ERIC database on the constitutional rights of juveniles and students be obtained?

ERIC (Educational Resources Information Center) is a nationwide educational information system operated by the Office of Educational Research and Improvement of the U.S. Department of Education. ERIC documents are abstracted monthly in ERIC's *RIE* (*Resources in Education*) index. *RIE* indexes are available in more than 850 libraries throughout the country. These libraries may also have a complete collection of ERIC documents on microfiche for viewing and photocopying.

ERIC documents may be purchased from the ERIC Document Reproduction Service (EDRS), 7420 Fullerton Road, Suite 110, Springfield, VA 22153-2852, in microfiche (MF). Some documents may also be available in paper copy (PC). The telephone numbers are (703) 404-1400 or (800) 443-3742. The FAX number is (703) 440-1408. When ordering by mail, be sure to include the ED number, specify either MF or PC, if available, and enclose a check or money order.

All of the journal article annotations, which include EJ numbers, appear in the *Current Index to Journals in Education (CIJE)*, which is published on a monthly basis and is available at larger libraries throughout the country. The annotations are intended to briefly describe the contents of the articles in general terms. Therefore, it is suggested that the reader locate the entire article in the journal section of a larger public or university library. Reprints of the article may be available from University Microfilms International (UMI), 300 North Zeeb Road, Ann Arbor, MI 48106, (800) 732-0616.

The ERIC documents and journal articles included in this bibliography are merely a few that can be found in the ERIC database. These items exemplify the large pool of documents on this topic that can be obtained through ERIC. The following entires were selected because of their relevance to social studies teachers in secondary schools.

Readers are encouraged to complete their own searches of the ERIC database to discover new items which are constantly being added to the system. Educators will find these documents and articles valuable resources for fostering understanding, application, and evaluation on the wealth of information being published concerning the constitutional rights of juveniles and students.

Aldridge, Kathy, and Jeanne Wray. "Students' Constitutional Rights." *Update on Law-Related Education* 12 (Winter 1988): 30-33. EJ 368 161.

Centering around a role-play simulating the search of students suspected of possessing illegal drugs, this lesson focuses on students' rights as related to the Bill of Rights. It calls upon students to argue landmark cases involving students' rights to enhance critical thinking skills.

Anthrop, Mary E. "The Controversy Over School Prayer." *OAH Magazine of History* 5 (Summer 1990): 40-47. EJ 425 015.

This article outlines a lesson for high school students covering religious controversies in New York City schools in the 1840s. Issues pertain to Irish-Catholic immigrants' objections to public school religious instruction and attempts to obtain public support for parochial schools. It also includes handouts concerning religious freedom, Bishop John Hughes' opinion, political cartoons, and the conflict's resolution.

Baldwin, Gordon B. *Student First Amendment Rights: Wisconsin School Board Association*. Madison, WI: Wisconsin School Board Association, 1991. ED 351 769.

Issues in students' First Amendment rights are discussed in this paper. The *Tinker v. Des Moines Independent Schools* (1969) decision is discussed, in which the United States Supreme Court struck down the discipline imposed on students who wore black armbands during school hours to protest the Vietnam War. A second court decision *Hazelwood School District v. Kuhlmeier* (1988), addressed the issue of principal censorship of school-sponsored newspapers.

Beckham, Joseph C. *School Officials and the Courts: Update 1992. ERS Monograph*. Arlington, VA: Educational Research Service, 1992. ED 355 621.

During the past year, in cases involving the authority of school boards to make curricular decisions and provide for services, the courts have balanced school board authority against constitutional and statutory provisions related to privacy, free exercise of religion, and public records laws.

Bodenhamer, David J. "Trial Rights of the Accused." *OAH Magazine of History* 5 (Summer 1990): 13-19. EJ 425 010.

This article examines the origins of the U.S. Bill of Rights and constitutional guarantees, focusing on trial rights, tracing them to English antecedents and the colonial period. It explains changes in understanding and the application of trial rights, highlighting the U.S. Supreme Court's evolving influence since the nineteenth-century and outlines contemporary issues, including controversial pretrial guarantees.

Boomer, Lyman W. "Searching Students: An Ethical and Legal Issue for Special Educators." *Preventing School Failure* 36 (Spring 1992): 16-19. EJ 452 978.

A survey of 238 Kansas principals, which found searching of students not uncommon, is reported. Relevant court litigation is briefly reviewed and lawful guidelines concerning "reasonable suspicion" and "reasonable scope" are explained.

Brady, Sheila, and others. *It's Yours: The Bill of Rights. Lessons in the Bill of Rights for Students of English as a Second Language*. Chicago, IL: Constitutional Rights Foundation, 1991. ED 346 000.

This curriculum presents lessons and materials designed to teach immigrant students their rights and responsibilities under the U.S. legal system. The lessons employ interactive strategies, and develop higher order thinking skills as they foster English language learning.

Bragaw, Don. "Expanding Social Studies to Encompass the Public Interest." *NASSP Bulletin* 75 (January 1991): 25-31. EJ 421 278.

Recognizing that the public good is a key concept for children now and in the future, educators call for discussion and investigation of public issues and student involvement in them. This article cites programs in New York and Minnesota and lists sources of classroom social studies materials.

Calpin, Joseph L. "State v. Federal Rights." *Update on Law-Related Education* 15 (Winter 1991): 18-19. EJ 433 734.

This article presents a learning activity in which students compare their state constitution's bill of right with the federal Bill of Rights. It provides a chart for identifying comparisons of enumerated rights and includes background information and explains objectives and procedures.

Camp, William E., and others. *The Principal's Legal Handbook*. Topeka, KS: National Organization on Legal Problems of Education, 1993. ED 354 606.

The principal is faced with myriad legal issues on a daily basis, making it imperative that he or she keep abreast with developing legal issues. This document treats divergent sections, including one on "Students and the Law", which surveys federal statutes and landmark Supreme Court decisions pertaining to the rights of students.

Cary, Jean M. "Legal Issues Related to Extracurricular Activities." *School Law Bulletin* 23 (Fall 1992): 15-23. EJ 455 727.

Legal questions related to extracurricular activities include the following: (1) students "right" to participate; (2) kinds of fees or insurance requirements; (3) regulation of contracts, and finances; (4) membership policies acceptable in light of Title IX's prohibition on sex discrimination; (5) reduction of risk of tort liability; and (6) how the Equal Access Act affects school policies.

Croddy, Marshall. "Bringing the Bill of Rights to the Classroom: An Anecdotal History of the Constitutional Rights Foundation." *Social Studies* 82 (November/December 1991): 218-22. EJ 447 866.

This article discusses the history of the Constitutional Rights Foundation (CRF). It describes its 1957 origins, its evolution from the Los Angeles Civil Liberties Foundation, and its association with the California State Board of Education and addressed the group's involvement in the law-related education movement. It also explores the CRF's role in marking the bicentennial of the U.S. Constitution.

Deivert, Richard G. "The Role of the Constitution in the Drug Testing of Student Athletes in the Public School." *Journal of Alcohol and Drug Education* 36 (Winter 1991): 32-41. EJ 428 125.

This article examines whether Fourth Amendment of United States Constitution applies to relationship between student athlete and educational institution and whether drug testing is illegal search and seizure in violation of the amendment. It suggests that institutions strike an appropriate balance between helping student athletes protect their own health, while ensuring that fundamental constitutional liberties are not compromised.

Eveslage, Thomas. *The Federal Courts and Educational Policy: Paternalism, Political Correctness, and Student Expression.* Paper presented at the annual meeting of the Association for Education in Journalism and Mass Communication, Montreal, Quebec, 1992. ED 351 716.

The focus of this paper is the extent to which the judiciary sets the tone for freedom of speech in educational environment, and in so doing, helps define educational institutions themselves. In particular, the paper examines what the federal courts have said about the roles and obligations of educators when dealing with the rights of public schools.

Fillichio, Susan. "Court Report: The Supreme Court Speaks on the Student Press, Criminal Law, Civil Rights, and a Host of Other Issues." *Update on Law-Related Education* 12 (Winter 1988): 54-56. EJ 368 168.

This article reports on recent U.S. Supreme Court decisions dealing with such topics as limitation of student press, freedom of speech under the First Amendment, and the admittance of women into all-male clubs.

Fleming, Merle Wilna, and Ronald L. Peeler. "*Mergens*: The Beginning, Not the End, of Questions Arising under the Equal Access Act." *West's Education Law Reporter* 64 (January 17, 1992): 15-28. EJ 419 958.

The Supreme Court's interpretation of the Equal Access Act in "Mergens" alters the role of school officials in the recognition and functioning of student groups. The views of the justices are summarized followed by issues that may arise if a school decides against, or in favor of, having a limited open forum.

Glickman, Suzin. "The Right of the People to be Secure in Their ... Houses ... against Unreasonable Searches and Seizures, Shall Not Be Violated ..." ... But What if You Have No House?" *Update on Law-Related Education* 16 (Winter 1992): 12-16. EJ 456 528.

This article presents an essay examining homeless shelter residents' freedom from unreasonable searches and reviews the historical background of the Fourth Amendment's ban on unreasonable search and seizure. It explores factors considered when determining what is "reasonable." It also analyzes the concepts of standing, what constitutes a home, and consent and discusses a possible new legal standard on searches.

Gottlieb, Stephen S. *A High School Student's Bill of Rights. Teaching Resources in the ERIC Database (TRIED) Series.* Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education and ERIC Clearinghouse for Reading and Communication Skills, 1991. ED 334 622.

Designed to tap the rich collection of instructional techniques in the ERIC database, this compilation of lesson plans focuses on teaching high school students their Constitutional rights and responsibilities. The 40 lesson plans in the book cover the courts and basic rights, the rights of criminal suspects, the rights of minors and education law, and individual freedom at school and in the working world.

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Gottlieb, Stephen S. *Teaching about the Constitutional Rights of Students.* ERIC Digest. Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education, 1992. ED 348 320. (See Appendix 3.)

If people are to exercise their rights and fulfill their responsibilities as citizens, they must understand those rights and responsibilities. Social studies teachers have a special role to play in shpaing the lives of young United States citizens. Those educators can help determine whether students know their civic rights and responsibilities and become politically involved adults.

Harris, Phillip H. "Invocations, Benedictions, and Freedom of Speech in Public Schools." *West's Education Law Reporter* 68 (September 26, 1991): 943-55. EJ 432 769.

The Supreme Court, in an upcoming case, *Lee v. Weisman,* will rule on whether prayer may be offered out loud at a public school graduation program. This article argues that past court decisions have interpreted the Establishment Clause of the First Amendment over the Free Speech Clause of that same amendment.

Hoge, John D., and Ann Blum, eds. *Georgia Elementary Law-Related Education Curriculum Supplements: Lessons for Kindergarten through Third Grade.* Athens, GA: Carl Vinson Institute of Government, 1991. ED 352 293.

The lessons in this volume were designed for teachers new to this area of the social studies curriculum. This volume also includes reprints of the U.S. Constitution and the Georgia Bill of Rights; ordering information; user report form; and a list of the lessons in the grades 4-7 supplement.

Hoge, John D., and Ann Blum, eds. *Georgia Elementary Law-Related Education Curriculum Supplements: Lessons for Fourth through Seventh Grade.* Athens, GA: Carl Vinson Institute of Government, 1991. ED 352 294.

The lessons in this volume are divided into years and treat divergent topics, such as "Where have all the wetlands gone?" and "Vandalism—Who Plays and Who Pays?"

Howard, Elizabeth. *Handbook for High School Teachers: Staff Development on the Topic of Constitutional Government.* Arlington, TX: Arc, 1992. ED 354 697.

This handbook was developed out of a series of seminars to provide inservice staff development on teaching about the Constitution and the Bill of Rights to high school students with and without special needs. Objectives and learning activities are presented to help students learn about: (1) legal rights; (2) voting; (3) what is happening in the real political world; and (4) local government.

James, Bernard. "Student Misbehavior and the Law." *School Safety* (Winter 1991): 28-29. EJ 422 802.

In *Bethel,* the Supreme Court essentially extended the reach of the ordinary discipline code to serve objectives that are part of the perceived educational mission. Citizenship of students is as important to the education process as academic concerns, according to recent decisions.

Johansen, Ingrid. "Prayer at School Events." *School Law Bulletin* 24 (Winter 1993): 1-10. EJ 465 311.

The United States Supreme Court, in the case of *Lee v. Weisman,* held that inviting clergy to deliver prayer during an official public-school graduation ceremony violates the Establishment Clause of the Constitution. This article discusses the *Lee* decision and addresses some of its possible implications for school law.

Jones, H. Lawrence, and James Martin. *The Equal Access Act: Policy and Regulations for Implementation.* 1991. ED 330 043.

The Equal Access Act of 1984 was drafted to implement access for religious clubs to public secondary schools, but with constitutionally protected safeguards to preclude entanglement of church and state. The case that the Supreme Court chose to hear, *Board of Education of Westside Community Schools v. Mergens* contained both elements and was decided in 1990. Now school administrators must face the dilemma of creating, maintaining, and protecting "limited open forums" within schools.

Kaltenheuser, Skip. "The Bill of Rights: Celebrating Two Hundred Years." *Humanities* 12 (January-February 1991): 30-32. EJ 430 523.

This article outlines projects organized by the Pennsylvania Humanities Council to celebrate the Bill of Rights bicentennial. It concentrates on a poster exhibit consisting of 12 panels depicting civil rights with accompanying essays. It also stresses promoting the Bill of Rights' relevance to students' lives and the humanities role in teaching lessons from history and political philosophy.

Kenny, Maureen, and Margaret Reilley. "A Bill of Rights Assembly." *Update on Law-Related Education* 15 (Winter 1991): 9-12. EJ 433 732.

This article presents a student- and community-produced assemly program in which several Supreme Court cases are reenacted. It focuses on student rights concerning search and seizure, freedom of speech, and freedom of the press. It also provides a 40- to 50-minute script with roles for narrators, administrators, police officers, reporters, lawyers, and students.

Kovas, Marcia. "The Impact of *Hazelwood* in the State of Indiana." *Quill and Scroll* 65 (February-March 1991): 4-8. EJ 424 329.

This article reports on a survey of Indiana high school newspaper advisors examining the impact of the *Hazelwood* v. *Kuhlmeier* Supreme Court decision on scholastic journalism programs. It finds that, although advisers believe in freedom of speech and the First Amendment rights for high school students despite the decision, they also express a tendency to avoid conflict.

Leming, Robert S., and others. *State of Indiana* v. *Jamie L. Curtis: "The Case of the Questionable Bookbag Search."* Indianapolis, IN: Eli Lilly Center for Exploration, 1992. ED 353 189.

These materials include the script for a mock trial in which students are asked to play the participants in a case based on the facts of *New Jersey* v. *T.L.O.* (1985). The case raised questions involving a students' rights to protection against unreasonable searches and seizures under the Fourth Amendment and schools' needs to maintain the environment free of illegal drugs. In addition to the script for the trial, the materials include background information on the facts of the case and on the development of the law under the Fourth Amendment.

Leming, Robert S. *Teaching about the Fourth Amendment's Protection Against Unreasonable Searches and Seizures.* ERIC Digest. Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education, 1993. ED 363 526. (See Appendix 4.)

With the passage of the U.S. Bill of Rights in 1791, Americans acquired protection against unreasonable searches and seizures by the federal government. The understanding and interpretation of ideas expressed in the Fourth Amendment have been influenced by historical events, technological inventions, and changes in thinking about the meaning of the provisions in the amendment.

Leming, Robert S. *Teaching the Law Using United States Supreme Court Cases.* ERIC Digest. Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education, 1991. ED 339 673. (See Appendix 2.)

Since 1789, the Supreme Court has been making decisions that affect all U.S. citizens. The study of Supreme Court cases, therefore, should be an integral part of civic education. This ERIC Digest discusses: (1) constitutional issues and Supreme Court cases that should be taught; and (2) effective strategies for teaching them.

Leming, Robert S., and others. *Using U.S. Supreme Court Simulations in the Classroom. "Sifting Through the Trash with Billy."* Indianapolis, IN: Indiana State Bar Association, 1992. ED number will be assigned.

The Supreme Court case, *California* v. *Greenwood*, raises important questions about search and seizure protections and was decided by the Supreme Court in 1988. The case addresses the issue of whether or not individuals have an "expectation of privacy" that includes their garbage. It also addresses the Exclusionary Rule, which suggests that evidence acquired through an "unreseasonable" search or seizure may be excluded from trial proceedings.

Lizotte, Leonne. "A Basic Right." *Update on Law-Related Education* 15 (Winter 1991): 29-30. EJ 433 737.

This article explains a lesson in which secondary social studies or history students research origins of the freedoms to assemble and petition the government. It points out that the lesson provides students with an opportunity to examine how these freedoms evolved since the American Revolution and reports that students discuss how to protect these freedoms during critical times.

Long, Gerald P. "Understanding Religious Freedom Through Courtroom Simulation." *OAH Magazine of History* 5 (Summer 1990): 31-34. EJ 425 013.

This article presents background information on Wisconsin v. Yoder (1972) in which the U.S. Supreme Court ruled that Wisconsin could not compel Amish students to attend high school. It outlines a lesson plan for simulating the court's decision and includes discussion questions that distinguish between the First Amendment establishment and free exercise clauses and that develop into minority rights.

Lufler, Henry S., Jr. *Pupils.* Topeka, KS: National Organization on Legal Problems of Education, 1991. ED 340 119.

Cases arguing about the use of school facilities by religious groups continued to increase in number in 1990; however cases involving home instruction and student searches declined. Cases are discussed under several sections, including substantive rights of students, including search and seizure, and First Amendment religious and freedom of expression rights and sanctions for student misconduct, including suspensions, expulsions, and corporal punishment.

McCarthy, Martha M. "Student Religious Expression: Mixed Messages from the Supreme Court." *West's Education Law Reporter* 64 (January 17, 1991): 1-13. EJ 419 957.

Although the Supreme Court's *Mergens* decision settled the controversy over the constitutionality of the Equal Access Act, the ruling seems to make more ambiguous the definition of a limited open forum for student expression and the legal status of devotional activities.

Model Policy on Student Publications Code. Des Moines, IA: Iowa State Department of Education, 1991. ED 334 663.

This policy manual includes reasonable provisions for regulating the time, place, and manner of student expression. The model policy statement appearing in this report delineates school liability and emphasizes students' First Amendment rights, the importance of journalistic skills, and robust debate about controversial topics, and the necessity for a workable appeals process.

Moran, Rachel F. "Finding a Place for Pluralism in the Schools: The Paradigms of Religion and Race." *Update on Law-Related Education* 16 (Spring-Summer 1992): 5-7, 42. EJ 460 367.

This article discusses cultural pluralism in the U.S. educational system and suggests that an official policy of religious neutrality cannot be the equivalent of colorblindness because the purpose of religious neutrality is diversity whereas that of racial neutrality if integration and assimilation. It concludes that much remains to be decided in dealing with both religion and race.

Moshman, David. *Adolescent Reasoning and Adolescent Rights.* Paper presented at the Biennial Meeting of the Society for Research in Child Development, Seattle, WA, 1991. ED 330 485.

In two recent U.S. Supreme Court Cases, *Hazelwood v. Kuhlmeier* (1988) and *Board of Education v. Mergens* (1990), the Court addressed the authority of public secondary schools to exercise control over student publication in the school newspaper and student meetings. It is argued that the two decisions are based on inconsistent assumptions about the intellectual competence of adolescents.

Nader, Ralph. "Children: Toward Their Civic Skills and Civic Involvement." *Social Education* 56 (April-May 1992): 212-14. EJ 450 807.

This article discusses projects used by some teachers, texts, and other instructional materials for teaching the responsibility and participatory aspects of citizenship. It suggests that texts currently in use neglect teaching the protection of rights and argues that corporations do more education than schools through their commercials. It also questions how some teachers overcome these difficulties and teach civic responsibility.

Nankivell, R., and others. "Court Briefs." *Update on Law-Related Education* 14 (Fall 1990): 39-44. EJ 427 752.

This article presents court briefs for three separate constituional issues: the individual right to die as tested in the "Cruzan v. Missouri Departmet of Health" case; constitutional rights and drunk driving; and student religious clubs' right to emet at public schools in accordance with the Equal Access Act of 1984. It also analyzes court opinions and explains the significance of each case.

Page, Melvin, and others. "From *Plessy* to *Brown*." *Update on Law-Related Education* 15 (Fall 1991): 12-13. EJ 450 750.

This article outlines class activities to help students understand how the U.S. Supreme Court reaches its decisions and how the decisions change over time. It includes objectives, resources, issues and questions, procedures, and evaluations and suggests that students will learn the facts and issues of important civil rights cases and form opinions on the decisions.

Pahl, Ronald H. "Suggested Sources for Teaching about the Bill of Rights." *Social Studies* 82 (November-December 1991): 232-33. EJ 447 869.

This article provides an annotated bibliography of materials for use in teaching about the Bill of Rights. It includes items selected for their breadth of instructional techniques, variety of sources, and uniqueness. It also states prices and directions for obtaining the materials.

Pahl, Ronald H. "The Past, Present, and Future of the Bill of Rights." *Social Studies* 82 (November-December 1991): 212-13. EJ 447 864.

This article examines the origins of the Bill of Rights and explores the temptation to focus on current problems at the expense of the future. It introduces four articles concerning teaching about the Bill of Rights.

Patchen, Diane. "An OCR Complaint: Pitfalls and Hazards." *Preventing School Failure* 36 (Fall 1991): 6-7. EJ 444 500.

In this article, an exceptional education administrator in a northeast Florida school district comments on complaints against the district filed with the Office of Civil Rights. The commentary discusses issues of individualized programs, discrimination, dealing with problems at the local level, and involvement of parents in the schools.

Patrick, John J., ed. *Ideas of the Founders on Constitutional Government: Resources for Teachers of History and Government.* Washington, DC: American Historical Association and American Political Science Association, 1991. ED 335 285.

This volume emphasizes the Founder's ideas on constitutional government and the primary documents in which these ideas were recorded. The book includes essays by scholars and nine lessons for high school courses in history and government, which may be copies and distributed to students.

Patrick, John J., and Robert S. Leming, eds. *Resources for Teachers on the Bill of Rights.* Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education, 1991. ED 329 489.

This book includes ideas and information that can enhance education about the constitutional rights of individuals in American history and the current system of government in the United States. The book contains essays by scholars, nine lessons for classroom use, an annotated bibliography, and a directory of organizations and persons.

Patrick, John J., and Robert S. Leming. *How to Teach the Bill of Rights.* New York: B'nai B'rith, Anti Defamation League, 1991. ED 332 928.

This work is designed to fit common educational objectives in curriculum guides, which call for teaching and learning about the U.S. Constitution and the Bill of Rights. It also encourages careful reading, analysis, and classroom discussion of primary documents and legal case studies on Bill of Rights issues in American history and our contemporary society. The book includes 12 lessons and extensive commentaries by the author about Bill of Rights topics and issues.

Patrick, John J. "Teaching and Learning the Bill of Rights." *OAH Magazine of History* 5 (Summer 1990): 25-30. EJ 425 012.

This article offers suggestions for teaching constitutional issues and the Bill of Rights. It observes that student achievement and response is significant when core content, primary documents, and case studies are employed and describes procedures for class discussions and recommends U.S. Supreme Court landmark cases for freedom of the press and speech issues.

Patrick, John J. "Rights and Liberties at Risk." *Update on Law-Related Education* 15 (Winter 1991): 3-5, 44-45. EJ 433 731.

This article reaffirms the importance of civic education and active learning about the Bill of Rights and attendant civic responsibilities and identifies four categories of knowledge deficiencies about the Bill of Rights. It explores four key ways to improve teaching and learning about the Bill of Rights and stresses connections between civic knowledge and the vitality of liberty.

Patrick, John J. "Teaching the Bill of Rights in Secondary Schools." *Social Studies* 82 (November/December 1991): 227-31. EJ 447 868.

This article identifies and discusses four keys to improved constitutional rights instruction.

Peach, Lucinda. "Why Do I Have To Go To School? Legal Literacy in the Classroom." *Update on Law-Related Education* 12 (Winter 1988): 22-29, 65. EJ 368 160.

Focusing on helping students become literate about law in the public school setting, this article describes a day in the life of a student and the legal aspects of the situations she encounters.

Pearce, Alexis C. "Investigating Allegations of Inappropriate Physical Punishment of Students by School Employees." *School Law Bulletin* 23 (Spring 1992): 15-21. EJ 448 509.

Any complaint against a school employee regarding inappropriate physical punishment should be taken seriously by administrators and pursued vigorously by an investigating attorney. The standards (especially regarding probably cause and obtaining warrants) for investigating such allegations are less stringent than those imposed in criminal investigations, but due process and presumption of innocence must be observed.

Pereira, Carolyn. "Law 'Tests'." *Update on Law-Related Education* 12 (Winter 1988): 44- 46. EJ 368 165.

This article describes an Illinois state law test which is constructed to promote discussion and debate about topics which directly affect students and other citizens. It provides questions which can be used as a basis for tests in any state and includes a discussion guide which answers test questions according to Illinois state law.

Pellow, Randall A. "Creating a Bill of Rights Activities Book." *Social Studies Journal* 20 (Spring 1991): 12-15. EJ 433 701.

This article recounts a pilot project in Pennsylvania in which student teachers field-tested Bill of Rights lesson plans and activities for intermediate grade teachers. It describes the project's phases and results, culminating in publication of "Without Them the Bill of Rights Would Be a Bill of Wrongs." It also briefly explains the book's 20 lessons.

Petronicolos, Loucas. *A Method for Evaluating Legal Decisions Which Affect Educational Policies.* Paper presented at the annual meeting of the Northeastern Educational Research Association, Ellenville, NY, 1991. ED 342 788.

Research about United States Supreme Court rulings, which affect public school policy, has largely disregarded the fact that the Constitution makes no direct reference to education. A method is outlines that may be of use to educational policy makers as they seek to respond to these rulings. The case of *New Jersey v. T.L.O.* (1985) is analyzed to develop the method.

Raimo, Angela M. "Fourth Amendment Challenges: The Legality of Searching Children." *Journal of Alcohol and Drug Education* 36 (Winter 1991): 73-81. EJ 428 129.

This article focuses on recent application and interpretation of the Fourth Amendment to school children and discusses the amendment in regard to the relationship between school authorities and children, students' legitimate expectation of privacy, reasonableness in justification of a search, issues of mass mandatory screening, and requirements of due process and individualized suspicion.

Rhodehamel, John J., and others. *Foundations of Freedom: A Living History of Our Bill of Rights.* Los Angeles, CA: Constitutional Rights Foundation, 1991. ED 345 996.

This book presents, in words and pictures, a history of the Bill of Rights to the U.S. Constitution. Also included are suggested activities for each of the 15 chapters and a unit activity incorporating both the facts and issues of the chapter, often testing the concept introduced against a new set of facts.

Richards, Joe B. *Student Expression: The First Amendment Does Not Protect Everything. (Student Newspapers, Handouts, Protests, Gangs, and Hate Speech.)* Paper presented at the Oregon School Law Conference, Eugene, OR, 1992. ED 358 521.

This paper outlines several U.S. Supreme Court cases dealing with student newspaper, handouts, protests, gangs, and hate speech. It discusses how these rulings have affected school authorities and students.

Robinson, Donald, and others. "Thoughts on the Roots and Evolution of the Bill of Rights." *Update on Law-Related Education* 15 (Winter 1991): 13-17, 43-44. EJ 433 733.

This article considers how the Bill of Rights originated and has evolved and reviews the political views of Alexander Hamilton and James Madison and the nature of their support for the Bill of Rights. It also explains nineteenth-century classical liberalism and its revolutionary view that political power inhered in the individual rather than in property ownership.

Rosen, Lou. *School Discipline Practices. A Manual for School Administrators.* Perrysburgh, OH: School Justice Institute, 1992. ED 357 440.

One of the most difficult and time-consuming set of problems school administrators face each day has to do with student discipline. This manual provides a series of suggestions on ways that successful schools and administrators deal with discipline problems. Models and examples included are intended to stimulate and assist practicing administrators when they attempt to review discipline procedures and practices in their schools.

Rosenblum, Warren, and others. *From the School Newsroom to the Courtroom. Lessons on the* ***Hazelwood*** *Case and Free Expression Policy Making in the Public Schools.* Los Angeles, CA: Constitutional Rights Foundation, 1989. ED 317 474.

The purpose of this lesson packet is to raise issues about student rights of free expression in public schools. Included are preparatory reading material and two classroom simulation activities. The lessons are based on the U.S. Supreme Court case *Hazelwood v. Kuhlmeier.*

Rossow, Lawrence F., and Janice A. Hininger. *Students and the Law. Fastback Series No. 317.* Bloomington, IN: Phi Delta Kappa Educational Foundation, 1991. ED 332 373.

Many of the court decisions in the 1960s and 1970s regarding student civil rights were decided in favor of students. By the 1980s the courts began to give administrators more authority. This change of judicial thinking means that school authorities must be reschooled concerning the rights of students. This booklet should help administrators understand the limits of their authority in matters of freedom of speech, student publications, search and seizure, drug testing, student-initiated religious activities, special education student discipline, expulsions, and suspensions.

Sanchez, J.M. "Expelling the Fourth Amendment from American Schools: Students' Rights Six Years After *T.L.O.*" *Journal of Law and Education* 21 (Summer 1992): 381-413. EJ 454 315.

This article reviews 18 criminal cases decided by state appellate courts that have applied standards set forth by U.S. Supreme Court in *New Jersey* v. *T.L.O.* which defined extent to which public school officials could constitutionally search students and their property. It contends Supreme Court made it possible for state courts to practically expunge Fourth Amendment from U.S. public schools.

Schimmel, David. "The First Amendment and the Rehnquist Court: Protecting Majority Values or Limiting Individual Liberty?" *Social Education* 55 (October 1991): 380-83. EJ 443 695.

This article examines recent Supreme Court opinions to illustrate how the justices are reinterpreting the First Amendment and discusses student freedom of expression, freedom of religion, the free exercise clause, and the establishment clause. It concluded that a perceived trend in court decisions to limit freedom of religion and expression requires teachers to help students understand constitutional questions.

Schreck, Myron. *The Fourth Amendment in the Public Schools: Issues for the 1990's and Beyond. Presentation Outline.* Paper presented at the annual meeting of the National Organization on Legal Problems of Education, Orlando, FL, 1991. ED 342 066.

In 1985, the U.S. Supreme Court, in *New Jersey* v. *T.L.O.*, held that the Fourth Amendment applies to searches and seizures conducted by public school administrators. This paper discusses the current state of Fourth Amendment law with regard to public school searches and seizures.

Siler, Carl. "The Establishment Clause: Teaching First Amendment Rights Using Primary Sources." *OAH Magazine of History* 5 (Summer 1990): 35-39. EJ 425 014.

This article argues students' understanding of the U.S. Constitution and the Bill of Rights is enhanced by reviewing historical decisions concerning ratification. Classroom discussion using "Original Intent" documents allows students to develop insight into the relationship between church and state and into judicial application of the Establishment Clause. It also includes a list of questions, recommended documents, a case study, and class handouts.

Starr, Isidore. "Thoughts on Teaching about Justice: Creative Use of the Humanities Can Spark Student Interest in an Important Concept." *Update on Law-Related Education* 16 (Winter 1992): 3, 28. EJ 456 524.

This article argues that the concept of justice offers many opportunities for creative teaching and observes that historical and contemporary examples can help students understand the relationship among justice, power, and law. It also suggests role playing and the study of legal symbols as means of helping students learn to comprehend legal concepts.

Tatel, David S., and others. "The 1990-91 Term of the United States Supreme Court and Its Impact on Public Schools." *West's Education Law Reporter* 70 (December 5, 1991): 1-21. EJ 437 544.

This review of the Supreme Court's term of cases that are relevant to school districts in divided into five sections by subject matter: (1) desegregation; (2) voting rights and political activity; (3) employment and labor; (4) student rights; and (5) special education. A list of cases and statutes discussed, with citations, is included at the end of the review.

Tatel, David S., and others. "The 1991-92 Term of the United States Supreme Court and Its Impact on Public Schools." *West's Education Law Quarterly* 2 (January 1993): 192-216. EJ 459 344.

This review of the Supreme Court's 1991-92 term is divided into seven sections: (1) desegregation; (2) religion and freedom of speech; (3) school liability and immunity; (4) employment and labor; (5) elections and voting rights; (6) school finance; and (7) special education. A list of cases and statutes discussed is included at the end.

Thomas, Guy. "Freedom, but With Limits." *Update on Law-Related Education* 15 (Winter 1991): 31-33. EJ 433 738.

This article examines the expansion and contraction of civil rights in response to sociopolitical developments and suggests that students review voting rights extentions and analyze case studies involving students' freedom of speech. It also lists topics for student research on a variety of free speech issues.

Urofsky, Melvin I. "The Relgion Clause." *OAH Magazine of History* 5 (Summer 1990): 20-24. EJ 425 011.

This article observes the U.S. Supreme Court rulings on religion have been fairly consistent, but controversies arise from judicial interpretations of the Constitution's religious clauses. It traces the history and development of major court decisions and religious issue rulings for both the Establishment and Free Exercise clauses and states religion in public schools continues as a persistent problem.

Vacca, Richard S., and C.H. Hudgins, Jr. *The Legacy of the Burger Court and the Schools, 1969-1986. NOLPE Monograph/Book Series No. 41.* Topeka, KS: National Organization on Legal Problems of Education, 1991. ED 335 733.

This book is limited to a study of the education opinions of the Supreme Court during the time that Warren Earl Burger served as Chief Justice. Over 100 opinions having direct bearing on education were issued during the Burger years, a total greater than in the entire Court's history.

Van Dyke, Jon M., and Melvin M. Sakurai. *Checklists for Searches and Seizures in Public Schools. 1992 Edition.* New York: Clark Boardman Callaghan, 1992. ED 352 705.

The Fourth Amendment protects an individual's justified expectations of privacy against unreasonable government intrusions; however, reasonable intrusions are allowed when legitimate governmental interests are served. This volume is intended to provide guidelines for school administrators on how to conduct searches and seizures in a manner consistent with the United States Constitution and state laws.

Weeks, J. Devereux. *Student Rights Under the Constitution: Selected Federal Decisions Affecting the Public School Community.* Athens, GA: Carl Vinson Institute of Government, 1992. ED 354 185.

Public school principals and teachers have a compelling need to understand student rights when teaching constitutional principles that apply to students. This books seeks to help both students and educators understand those rights. The work concerns itself with the fundamental federal constitutional rights of public school students.

West, Jean, and Wynell Burroughs Schamel. "Due Process and Student Rights: Syllabus of the *Goss v. Lopez* Decision." *Social Education* 55 (March 1991): 161-63, 168. EJ 430 533.

This article provides background information for two Supreme Court decisions that can be used to teach the concepts of due process and student rights. It lists vocabulary and suggests document analysis and student research activities. It includes a copy of the *Goss v. Lopez* decision and explains how school systems are required to provide students a minimum of due process.

Whitson, James Anthony. "After *Hazelwood*: The Role of School Officials in Conflicts over the Curriculum." *ALAN Review* 20 (Winter 1993): 2-6. EJ 463 685.

This article analyzes in some detail a number of censorship cases affected by the 1988 United States Supreme Court case, *Hazelwood School District v. Kuhlmeier*. It considers how principals have been affected by the ruling in their relation to the issue of censorship and presents ideas about how administrators should deal with the issue.

Williams, Mary Louise. "The Struggle for Equality." *Update on Law-Related Education* 15 (Fall 1991): 15-22. EJ 450 752.

This article presents a lesson tracing the legal evolution toward greater justice in U.S. society from 1865-1965 through congressional acts and Supreme Court decisions. It includes student handouts of major civil rights cases, legislation, and background information and provides a bar graph for evaluating Supreme Court decisions and congressional acts that advance or regree equality for African Americans in the United States.

Williams, Mary Louise. "Freedom of Religion and the Public Schools." *Update on Law-Related Education* 15 (Spring/Summer 1991): 27-32. EJ 445 209.

This article presents activities for teaching high school students about freedom of religion and includes student handouts that explain basic constitutional principles and summarize leading U.S. Supreme Court cases concerning religious liberty. It encourages teachers to invite students to speculate on the future relationships of religion and public education.

Worona, Jay. *Public Education and Issues of Church and State.* Albany, NY: New York State School Boards Association, 1992. ED 351 743.

Recent court decisions are described under many headings, which include requests by parents to have their children excused from parts of the curriculum that conflict with their religious beliefs and use of school facilities by outside religious groups.

VIII

NATIONAL LAW-RELATED EDUCATION RESOURCE CENTERS AND STATE COORDINATORS FOR LAW-RELATED EDUCATION

National Organizations

American Bar Association/Special Committee on Youth Education for Citizenship
National LRE Resource Center
541 North Fairbanks Court
Chicago, IL 60611-3314
(312) 988-5735
Paula Nessel

Center for Civic Education
5146 Douglas Fir Road
Calabasas, CA 91302
(818)340-9320
Charles N. Quigley

Center for Research and Development in LRE
(CRADLE)
Wake Forest University School of Law
2714 Henning Drive
Winston-Salem, NC 27106
(909) 721-3355

Constitutional Rights Foundation
601 South Kingsley Drive
Los Angeles, CA 90005
(213) 487-5590
Todd Clark

Suite 1700
407 South Dearborn
Chicago, IL 60605
(312) 663-9057
Carolyn Pereira
Diana Hess

Law Education and Participation (LEAP)
Temple University School of Law
1719 North Broad Street
Philadelphia, PA 19122
(215) 204-8954
David Keller Trevaskis

National Institute for Citizen Education in the Law (NICEL)
711 G Street, SE
Washington, DC 20003
(202) 546-6644
Lee Arbetman
Bebs Chorak

Phi Alpha Delta Public Service Center (PAD)
1511 K Street, NW Suite 611
Washington, DC 20005
(202) 638-2898
Jack Hanna and/or Gracemarie Maddalena

Social Science Education Consortium
3300 Mitchell Lane, Suite 240
Boulder, CO 80301-2272
(303) 492-8154
James Glese

Social Studies Development Center
Indiana University
2805 East 10th Street, Suite 120
Bloomington, IN 47478-2698
(800) 266-3815
John J. Patrick

State Coordinators for Law-Related Education

Alabama
Jan Loomis
Alabama Center for Law & Civic Education
Cumberland School of Law
800 Lakeshore Drive
Birmingham, AL 35229
(202) 870-2435

Alaska
Marjorie J. Menzi
State Department of Education
P.O. Box F, 801 West 10th Street
Juneau, AK 99811-0500
(907) 465-8720

Deborah O'Reagan
Alaska Bar Association
P.O. Box 100279
Anchorage, AK 99510

Doug Phillips
2310 Paxson
Anchorage, AK 99504
(907) 269-2210

Arizona
Lynda Rando
Arizona Center for LRE
Arizona Bar Association
363 North 1st Avenue
Phoenix, AZ 85003
(602) 340-7360

Arkansas
Barbara Stafford
Executive Director
Learning Law in Arkansas, Inc.
12115 Hinson Road
Little Rock, AR 72212
(501) 227-5646

California
Joseph P. Maloney, Executive
Director
Citizenship and LRE Center
9738 Lincoln Village Drive, #20
Sacramento, CA 95827
(916) 228-2325

Colorado
Barbara Miller
Colorado Legal Education Project
3300 Mitchell Lane, Suite 240
Boulder, CO 80301-2272
(303) 492-8154

Gayle Mertz
Safeguard LRE Program
P.O. Box 471
Boulder, CO 80306
(303) 441-3805

LRE Coordinator
Colorado Department of
Education
Off. of Fed. Relations & Instruct.
Services
201 East Colfax
Denver, CO 80203

Connecticut
James A. Schmidt
Consortium Law & Citizenship
Education
Secretary of State's Office
30 Trinity Street
Hartford, CT 06106
(203) 566-3904

Delaware
Lewis E. Huffman
Supervisor, Social Studies
Department of Public Instruction
P.O. Box 1402
Dover, DE 19903
(302) 739-4885

Francis O'Malley
901 N. Broom Street
Wilmington, DE 19806

Barry Townsend
Delaware LRE Project
110 West 7th Street
New Castle, DE 19720
(302) 328-5533

Laura Randa
Delaware Teachers' Academy
for Service Learning
Jesse Cooper Building
P.O. Box 637
Dover, DE 19903-0637
(302) 739-4456

Duane Werb
Director/Street Law
Delaware Law School
300 Delaware Avenue
P.O. Box 25046
Wilmington, DE 19899
(302) 652-1133

District of Columbia
Judy Zimmer
Director
DC Center for Citizen Education
in Law
711 G Street, SE
Washington, DC 20003
(202) 546-6644

Gracemarie Maddalena
Phi Alpha Delta Public Service
Center
1511 K Street, NW
Suite 611
Washington, DC 20005
(202) 638-2898

Florida
Annette Boyd Pitts
Florida LRE Association
325 John Knox Road
Building E, Suite 104
Tallahassee, FL 32399-1906
(904) 386-8223

Ronald Cold
Coordinator, LEGAL Project
Dade County Public Schools
Administration Building
1450 NE 2nd Avenue, Room 939
Miami, FL 33132

Georgia
Ann Blum, Georgia LRE
Consortium
Carl Vinson Institute for
Government, University of
Georgia
201 N. Milledge Avenue
Athens, GA 30602-5428
(706) 542-2736

Hawaii
Sharon Kaohi
OIS, General Education Branch
189 Lunalilo Home Road, 2nd
Floor
Honolulu, HI 96825
(808) 396-2540

Idaho
Linda Clark
Idaho Law Foundation
204 West State Street
Boise, ID 83701
(208) 342-8958

Illinois
Ruth Woodruff
Director, Illinois LRE Project
Constitutional Rights Foundation
407 S. Dearborn, Suite 1700
Chicago, IL 60605
(317) 663-9057

Donna Schechter
Dennis Rendleman
Committee on LRE
Education for the Public
Illinois State Bar Association
424 South 2nd Street
Springfield, IL 62701
(217) 525-1760

Maureen O'Connor, Assistant Director
Administration Office
Illinois Courts Judicial Education
300 East Monroe Street
Springfield, IL 62701-1436

Indiana
Robert S. Leming
Director, Indiana Program for LRE
Social Studies Development Center
Indiana University
2805 East 10th Street, Suite 120
Bloomington, IN 47408-2698
(812) 855-0467

Iowa
Timothy Buzzell
Director, Iowa Center for LRE
Drake University Law School
Des Moines, IA 50311-4505
(515) 271-4956

Kansas
Patti Slider
Editor, Law Wise
The Kansas Bar Association
P.O. Box 1037
Topeka, KS 66601
(913) 234-5696

Richard D. Leighty
Education Program Specialist
Kansas State Department of Education
120 East 10th Street
Topeka, KS 66612
(913) 296-3142

Kentucky
Bruce Bonar, Director
Model Laboratory School
Eastern Kentucky University
Richmond, KY 40475
(606) 622-1032

Tami Dowler, KY Education Association
1124 Hopi Trail
Frankfort, KY 40601
(502) 875-2889

Louisiana
Wanda Anderson Tate
1 Galleria Boulevard, #1704
Metarie, LA 70001
(504) 836-6666

William Miller
Bureau of Secondary Education
Louisiana State Department of Education
P.O. Box 44064
Baton Rouge, LA 70804

Maine
Theresa Bryant, Maine LRE Program
University of Maine School of Law
246 Deering Avenue
Portland, ME 04012
(207) 780-4159

Virginia Wilder Cross
Public Affairs Director, Maine State Bar Association
124 State Street
Augusta, ME 04332
(207) 622-7523

Maryland
Rick Miller
Citizenship/LRE-Maryland
UMBC/MP 007
5401 Wilkens Avenue
Baltimore, MD 21228-5398
(410) 455-3239

Massachusetts
Nancy Waggnoer
Mass. Supreme Court, Public Information
Room 218, Old Courthouse
Boston, MA 02108
(617) 725-8524

Nancy Murray
Bill of Rights Education Project
Civil Liberties Union of MA
10 Temple Place, 5th Floor
Boston, MA 02111
(617) 482-3170, X314

Nancy Kaufer
Director, LRE
Massachusetts Bar Association
20 West Street
Boston, MA 02111-1218

Michigan
Linda Start
Director, Michigan LRE Project
2100 Pontiac Lake Road
Waterford, MI 48328
(313) 858-1947

Minnesota
Jennifer Bloom
Director, Minnesota Center Comm. Legal Education
Hamline Law School
1536 Hewitt Avenue
St. Paul, MN 55104
(612) 641-2279

Mississippi
Lynette Hoyt McBrayer
Mississippi State Bar
643 North State Street
P.O. Box 2168
Jackson, MS 39225-0771
(601) 960-9572

Missouri
Linda Riekes
St. Louis Public Schools
Law and Citizenship Education Unit
5183 Raymond Avenue
St. Louis, MO 63113
(314) 361-5500, X257

Christopher C. Janku
LRE Field Director, Missouri Bar
326 Monroe Street
Jefferson City, MO 65102
(314) 635-4128

Montana
Michael Hill
Office of Public Instruction
State Capitol
Helena, MT 59620
(406) 444-3924

Lorrie Monprode-Holt
3725 Canyon Ferry
East Helena, MT 59635
(406) 449-4164

Nebraska
Tom Keefe
LRE Coordinator
Nebraska State Bar Association
P.O. Box 81809
Lincoln, NE 68501-1809
(402) 475-7091

Nevada
Phyllis Darling
Director, Nevada Center for LRE
601 N. Ninth Street
Las Vegas, NV 89101
(702) 799-8468

New Hampshire
Moira Notargiacomo, LRE Coordinator
New Hampshire Bar Association
112 Pleasant Street
Concord, NH 03301
(603) 224-6942

Carter B. Hart, Jr.
NH State Department of Education
101 Pleasant Street
Concord, NH 03301
(603) 271-2632

Jane Beecher
Juvenile Conference Committee
City Hall, 3 Washington Street
Keen, NH 03431
(603) 357-9810

New Jersey
Arlene Gardner & James Daley
New Jersey Center for LRE
Seton Hall University
103 McQuaid Hall
South Orange, NJ 07079
(908) 789-9093

Leisa-Anne Smith
New Jersey State Bar Foundation
One Constitution Square
New Brunswick, NJ 08901-1500
(908) 249-5000, X258

New Mexico
Cindy Silva
New Mexico Bar Foundation LRE
P.O. Box 27439
Albuquerque, NM 87125
(505) 764-9417

New York
Mary Hughes
Assistant District Attorney
Kings County District Attorney
210 Joralemon Street
Brooklyn, NY 11201
(718) 802-2000

Thomas J. O'Donnell
Director, Project PATCH
Northport-East UFSD
110 Elwood Road
Northport, NY 11768
(516) 261-9000, X284

Eric Mondeschein
Director Law, Youth, & Citizenship Program
New York State Bar Association
1 Elk Street
Albany, NY 12207
(518) 474-1460

North Carolina
Doug Robertson
Social Studies Sector
NC Department of Public Instruction
116 West Edenton Street
Raleigh, NC 27603-1712
(919) 715-1877

North Dakota
Deborah Knuth
State Bar of North Dakota, St 101
515 1/2 E. Broadway
Bismarck, ND 58501
(701) 255-1404

Ohio
Nick Topougis
Executive Director, Ohio Center for LRE
P.O. Box 16562
Columbus, OH 43216-6562
(614) 487-2050

Oklahoma
Michael H. Reggio, Coordinator, LRE
Oklahoma Bar Association
P.O. Box 53036
Oklahoma City, OK 73152
(405) 524-2365

Oregon
Marilyn Cover
Director, Classroom Law Project
Lewis & Clark Law School
10015 S. W. Terwilliger Blvd.
Portland, OR 97219
(503) 768-6623

Pennsylvania
David Keller Trevaskis, Director
Law Education and Participation (LEAP)
Temple University School of Law
1719 North Broad Street
Philadelphia, PA 19122
(215) 204-8954

Rhode Island
Holly Hitchcock, RI Supreme Court
250 Benefit Street
Providence, RI 02903
(401) 277-2500

Joyce Stevos
Director of Program and Staff Development
Providence School Department
797 Westminster
Providence, RI 02903
(401) 456-9126

Claudette Field
Rhode Island Legal/Education
Partnership Program
22 Hayes Street
Providence, RI 02908
(401) 861-5737

Theresa Watson
Ocean State Center for Law & Citizen Ed.
22 Hayes Street
Providence, RI 02908
(401) 861-5737

South Carolina
Cynthia Coker, Dir. of LRE & Pro Bono
South Carolina Bar
P. O. Box 608
Columbia, SC 29202
(803) 252-5139

South Dakota
Robert W. Wood, Professor
School of Education
University of South Dakota
414 East Clark Street
Vermillion, SD 57069
(605) 677-5832

Tennessee
Suzanne Stampley
Tennessee Bar Association, LRE Program
4024 Port Victoria Court
Hermitage, TN 37076
(615) 883-7701

Texas
Rhonda Haynes
State Bar of Texas, LRE Program
P.O. Box 12487 Capitol Station
Austin, TX 78711
(512) 463-1388

Utah
Nancy Mathews
c/o Utah State Office of Ed.
250 East 500 South
Salt Lake City, UT 84111
(801) 538-7742

Kathy D. Dryer, Esq., Executive Director
Utah LRE Project
645 South 200 East, Suite 101
Salt Lake City, UT 84102
(801) 322-1802

Rulon Garfield
Professional Educational Leadership
Brigham Young University
Box 1, McKay Bldg.
Provo, UT 94602
(801) 378-5076

Vermont
Susan M. Dole
Executive Director
Vermont Bar Association
P.O. Box 100
Montpelier, VT 05601
(802) 223-2020

Virginia
Robin Haskell McBee
Director, Virginia Consortium for LRE
VCU School of Education, Box 2020
1015 West Main Street
Richmond, VA 23284-2020
(804) 367-1322

Washington
Jo Rosner
Washington State Bar Association
500 Westin Bldg., 2001 6th Avenue
Seattle, WA 98121-2599
(206) 448-0441

Margaret Armancas-Fisher
University of Puget Sound
Institute for Citizen Education in the Law
950 Broadway Plaza
Tacoma, WA 98402-4470
(206) 329-2690

West Virginia
Barbara Jones
West Virginia Department of Education
Capitol Complex, Room B-337
1900 Washington Street E
Charleston, WV 25305

Thomas R. Tinder
Executive Director
West Virginia State Bar
2006 Kanawha Blvd. E.
Charleston, WV 25311
(304) 558-7993

F. Witcher McCullough
West Virginia Bar Foundation
P.O. Box 346
Charleston, WV 25322

Wisconsin
Dee Runaas
LRE Coordinator, State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158
(608) 257-3838

Wyoming
Richard Kean
3612 Moore Avenue
Cheyenne, WY 82001

Donald Morrie
Wyoming LRE Advisory Council
717 Frontier Park Avenue
Cheyenne, WY 82001
(302) 632-8013

Tony Lewis
Director, Wyoming State Bar
P.O. Box 109
Cheyenne, WY 82003-0109
(307) 632-9061

APPENDIX I

Constitution of the United States

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of Free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.]* The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,] for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.]

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

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*Changed by section 2 of the Twentieth Amendment.

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The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be [on the first Monday in December,] unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than Two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or

Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of the President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.]

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.]

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

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Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One Thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same. done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our Names, Go. Washington—Presidt. and deputy from Virginia

New Hampshire
John Langdon
Nicholas Gilman

Massachusetts
Nathaniel Gorham
Rufus King

Connecticut
Wm. Saml. Johnson
Roger Sherman

New York
Alexander Hamilton

New Jersey
Wil: Livingston
David Brearley
Wm. Paterson
Jona: Dayton

Pennsylvania
B Franklin
Thomas Mifflin
Robt Morris
Geo. Clymer
Thos. FitzSimons
Jared Ingersoll
James Wilson
Gouv Morris

Delaware
Geo: Read
Gunning Bedford jun
John Dickinson
Richard Bassett
Jaco: Broom

Maryland
James McHenry
Dan of St Thos. Jenifer
Danl Carroll

Virginia
John Blair—
James Madison Jr.

North Carolina
Wm. Blount
Richd. Dobbs Spaight
Hu Williamson

South Carolina
J. Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler

Georgia
William Few
Abr Baldwin
Attest William Jackson Secretary

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA ARTICLES IN ADDITION TO, AND AMENDMENTS OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

Amendment I.*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re- examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI.**

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII.***

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and

*The first ten Amendments (Bill of Rights) were ratified effective December 15, 1791.

**The Eleventh Amendment was ratified February 17, 1795.

***The Twelfth Amendment was ratified June 15, 1804.

House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—]* The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII.**

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV.***

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV.****

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

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*Superseded by section 3 of the Twentieth Amendment.

**The Thirteenth Amendment was ratified December 16, 1865.

***The Fourteenth Amendment was ratified July 9, 1868.

****The Fifteenth Amendment was ratified February 3, 1870.

Amendment XVI.*

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII.**

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII.***

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.]

Amendment XIX.****

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX.*****

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI.******

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

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*The Sixteenth Amendment was ratified February 3, 1913.

**The Seventeenth Amendment was ratified April 8, 1913.

***The Eighteenth Amendment was ratified January 16, 1919. It was repealed by the Twenty-First Amendment, December 5, 1933.

****The Nineteenth Amendment was ratified August 18, 1920.

*****The Twentieth Amendment was ratified January 23, 1933.

******The Twenty-First Amendment was ratified December 5, 1933.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII*

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the Office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII.**

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV.***

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV.****

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon

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*The Twenty-Second Amendment was ratified February 27, 1951.

**The Twenty-Third Amendment was ratified March 29, 1961.

***The Twenty-Fourth Amendment was ratified January 23, 1964.

****The Twenty-Fifth Amendment was ratified February 10, 1967.

Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI*

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII.**

No law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened.

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*The Twenty-Sixth Amendment was ratified July 1, 1971.

**The Twenty-Seventh Amendment was ratified May 7, 1992.

APPENDIX II

ERIC Digest EDO-SO-91-8 **September 1991**

Teaching the Law Using United States Supreme Court Cases

by Robert S. Leming

"We are very quiet there, but it is the quiet of a storm centre." These words were used in 1913 by Associate Justice Oliver Wendell Holmes Jr. to describe the Supreme Court. Since 1789, the Court has been making decisions that affect all of us. The study of Supreme Court cases, therefore, should be an integral part of civic education. This ERIC Digest discusses (1) constitutional issues and Supreme Court cases that should be taught and (2) effective strategies for teaching them. It also includes a list of national organizations that develop resources to enhance the teaching of Supreme Court cases.

Selection of Constitutional Issues and Supreme Court Cases. When deciding which cases to include in the curriculum, a teacher must choose from hundreds of potential cases. The following criteria can guide decisions about which cases and issues should be included.

Select "landmark decisions" that constitutional scholars have, for the most part, agreed are the most important ones. For example, John A. Garraty's book *Quarrels That Have Shaped The Constitution* describes twenty landmark decisions from *Marbury* v. *Madison* (1803) to *Roe* v. *Wade* (1973). Duane Lockard and Walter F. Murphy's *Basic Cases in Constitutional Law* includes thirty-one landmark decisions. Publications like these should be used as guides to case selection.

Cases should be studied that involve issues in the lives of pre-adults. Students are more likely to be interested in cases that affect them directly. For example, in *Tinker* v. *Des Moines Independent School District* (1969), Justice Abe Fortas, writing the majority opinion in this case that declared that the wearing of black armbands to protest the Vietnam War was a form of "symbolic speech", argued that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, in the 1980s, cases were decided that seemed to limit the rights of students while in a school setting. For example, in *New Jersey* v. *T.L.O.* (1985), the Supreme Court decided that school officials need only "reasonable suspicion" rather than "probable cause" to search a student's property. A few years later, in *Hazelwood School District* v. *Kuhlmeier* (1988), the Court held that public school officials may censor student speech which takes place in school sponsored forums. Justice Byron White, writing for the majority, argued that the school newspaper *Spectrum* is not a public forum and is sponsored by the school, therefore, school authorities may exercise editorial control over its contents.

Some cases chosen should emphasize the paradox of majority rule with respect for minority rights, two core concepts of constitutional democracy. The Supreme Court has acted as the "David" against the "Goliath" of an oppressive majority. For example, in *Texas* v. *Johnson* (1989), the Court agreed with the Texas Court of Appeals decision to reverse Johnson's conviction for publicly burning the American flag. Despite the possible influence of the majority of American citizens, who disagreed with Johnson, the Court, in a 5-4 decision, upheld the rights of an individual who expressed an emphatically unpopular position. In 1948, the Court, in its unanimous decision in *Shelley* v. *Kraemer*, put an end to racial covenants. One of the attorneys for the petitioner, Thurgood Marshall, argued that racial covenants, enforced by state courts, had denied to African American citizens rights that were enjoyed, as a matter of fact, by other citizens representing the majority. These decisions and others illustrate the paradoxical relationship of majority rule with respect for minority rights.

Effective Instructional Strategies for Teaching Supreme Court Cases. Using a variety of instructional strategies throughout the school year is the most effective way to teach Supreme Court cases. Some practical examples are presented below.

Teach Supreme Court cases in historical context so that the constitutional issue is cast within the social forces that generated it. For example, should student expression be limited in school settings? What types of actions violate the Establishment Clause of the Constitution? What constitutes cruel and unusual punishment? What kinds of searches and seizures violate the Fourth Amendment? Does the Second Amendment's right to bear arms include owning a machine gun? These issues and others should be examined in an historical perspective and in terms of present-day standards in recent court decisions. How have decisions and standards changed over time? By discussing the legal precedents to a modern decision, students can begin to understand both the continuity and the fluidity of the law, as well as the political and social times in which a case was decided.

When discussing Supreme Court cases, both the majority and dissenting opinions should be examined. Students need to understand that if judges can disagree about important issues, then citizens should feel confident to do the same.

Using a brief lecture along with discussion is an excellent method to introduce an issue and subsequently the case or cases for examination. However, use of the case study method is probably the most common and effective strategy for teaching Supreme Court issues and decisions. To be successful with this strategy, the teacher must be will informed on the legal issues and facts of the case. The approach is successful because of the active involvement of students in analyzing a legal case by participating in class discussions that identify a particular legal issue, taking sides, stating points of view, and formulating and

Robert S. Leming is Director of the Indiana Program for Law-Related Education of the Social Studies Development Center of Indiana University.

evaluating decisions. When using the case study method, students are encouraged to carry out the following steps:

- Review the background information and the facts in the case.
- Determine the main issue in the case.
- Examine alternative arguments on the issue in the case.
- Consider the decision (both majority and dissenting opinions) and legal reasoning in the case.
- Assess the implications and the significance of the case in constitutional history.

A moot court simulation is a very exciting instructional strategy that involves students in a role play of the United States Supreme Court. Similar to the case study method, a moot court simulation calls for active involvement of students. Acting as judges and attorneys, students learn how the Supreme Court operates and develop a better understanding of the case in question and the issues involved.

To create a successful simulation, students are encouraged to engage in the following procedures. First, as a whole class, review the background information and the facts in the case. Second, as a whole class, determine the main issue in the case. Third, divide students into three groups:

(1) Judges, who review the facts in the case, clarify the issue, and prepare questions that will be asked of the attorneys during the simulation.
(2) Petitioners, who prepare two or three written and oral arguments for the simulation.
(3) Respondents, who prepare two or three written and oral arguments for the simulations.

Two court simulation options are presented below.

(1) Involve the class as one court room with nine justices, two attorneys for the petitioner and respondent. The remainder of the class serves as an audience.
(2) Divide the class into three to five small groups; each group includes three judges, one or two attorneys for both the petitioner and the respondent. The small courts will operate individually. This option is advantageous because of the possibility of conflicting decisions by the courts. If the classrooms courts differ in their judgments, students will begin to understand the importance of dissenting opinions and the make-up of the court.

Debrief the court simulation by reading the real decision and engaging in an evaluation of the decisions made in the classroom. Discuss the implications and the significance of the case in constitutional history.

Sources of Information and Material about How to Teach the Law Using Supreme Court Cases. Information and materials on Supreme Court cases can be obtained from the organizations listed below:

- American Bar Association; Special Committee on Youth Education for Citizenship; 541 N. Fairbanks Avenue; Chicago, IL 60611-3314; (317) 988-5735.
- Center for Civic Education (CCE); 5146 Douglas Fir Road; Calabasas, CA 91302; (818) 340-9320.
- Center for Research and Development in Law-Related Education (CRADLE); Wake Forest University, School of Law; Box 7206, Reynolds Station; Winston-Salem, NC 27109; (918) 761-5872.
- Constitutional Rights Foundation (CRF); 601 S. Kingsley Drive; Los Angeles, CA 90005; (213) 487-5590.
- Chicago Office of the CRF; Suite 1700, 407 South Dearborn; Chicago, IL 60605; (312) 663-9057.
- National Institute for Citizenship Education in the Law (NICEL); 711 G Street, SE; Washington, DC 20003; (202) 546-6644.
- Phi Alpha Delta Public Service Center (PAD); 7315 Wisconsin Avenue; Suite 325E; Bethesda, MD 20814; (301) 986-9406.

References and ERIC Resources

The following list of resources includes references used to prepare this Digest. The items followed by an ED Number are in the ERIC system. They are available in microfiche and paper copies from the ERIC Document Reproduction Service (EDRS). For information about prices, contact EDRS, 7420 Fullerton Road, Suite 110, Springfield, Virginia 22153-2852; telephone numbers are 703-440-1400 and 800-443-3742. Entries followed by an EJ number are annotated monthly in CURRENT INDEX TO JOURNALS IN EDUCATION (CIJE), which is available in most large public or university libraries. EJ documents are not available through EDRS. However, they can be located in the journal section of most libraries by using the bibliographic information provided below.

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APPENDIX III

ERIC Digest EDO-SO-92-6 **August 1992**

Teaching about the Constitutional Rights of Students

by Stephen S. Gottlieb

If people are to exercise their rights and fulfill their responsibilities as citizens, they must understand those rights and responsibilities. Social studies teachers have a special role to play in shaping the lives of young United States citizens. Those educators can help determine whether students will know their civic rights and responsibilities and become politically involved adults.

U.S. Government Structure and Citizens' Rights. An appreciation of the rights and responsibilities of American citizens requires a basic understanding of the structure of the United States government. Teachers can use lectures, readings, role-playing activities, and a host of other techniques to help students understand the organization of the federal government and its relationship to the individual states. The most natural starting point for such study is the Constitution.

Students will be interested to learn that the Bill of Rights, which many consider to be a model civil liberties document, was the result of a compromise. It was offered to allay fears about the strong central government established under the basic Constitution. Some state ratifying conventions would not have approved the Constitution had they not been promised the Bill of Rights as well.

Criminal Law and Juvenile Justice. The Constitution's Fourth Amendment prohibits police officers from breaking into people's homes without a warrant, seeking out and seizing evidence of crimes, and using that evidence against the residents in criminal trials. However, it was not until 1961 that the U.S. Supreme Court established the "exclusionary rule" clearly, which prevents officials from using evidence gained illegally in the prosecution of a person accused of a crime. Students will enjoy debating whether that landmark ruling in the case of *Mapp v. Ohio* was the right decision for the Court, and what problems it could pose for law enforcement. For example, critics have argued that the "exclusionary rule" may result in acquittal of persons who might otherwise have been proven guilty. Supporters, however, have hailed it as a great defense of individual liberties.

Critics of the criminal justice system often ask why the state should have to supply defense attorneys for criminal suspects. To a person who has not made a serious study of the Constitution, it might seem odd that the government sometimes assists people who may have broken the government's own laws. The 1963 case of *Gideon v. Wainwright* stands for the proposition that a person cannot be denied equal access to justice simply because he lacks the resources to pay for his defense. The questions of whether poverty justifies free legal representation and whether a poor person gets the same quality legal help as a rich person does provide excellent grounds for class discussion.

Anyone who has watched a television police drama in the last few decades is familiar with the litany known as the "Miranda warning." Most people probably do not know who Miranda was or realize the full significance of the individual instructions. What does the Fifth Amendment's ban on compelling a person to be a witness against himself have to do with the Miranda case? An informed citizen should know. Was the Miranda decision a necessary defense of individual rights? Or has it unfairly restricted police officers in their apprehension of criminals? Students should be challenged to debate this constitutional issue.

In some countries, citizens must carry identity cards and show them to public authorities on demand. In most circumstances in the United States, people going about their business do not have to stop and explain themselves to every passing police officer. People need to be aware, however, that there are exceptions to this general rule. Administrative checks of automobiles and roadblocks to seek out drunk drivers on public highways have been upheld by the courts. Even on the sidewalk, police can stop people who are acting suspiciously, and frisk them when the situation warrants. Where should the United States draw the line between the "let me see your papers" mentality of authoritarian regimes and the legitimate interest of governments in protecting the public from dangerous individuals? This critical question should be used to focus classroom discussions.

The Eighth Amendment bars the imposition of cruel and unusual punishment and prohibits excessive bails and fines. When is a punishment "cruel and unusual"? When is a fine "excessive"? Much has been written about the relationship between the Eighth Amendment and capital punishment. Given a hypothetical situation about a death penalty case, a classroom may produce as many different opinions about the case as there are students in the class.

The law treats children accused of breaking the law somewhat differently from adult suspects. Prosecutors generally must follow a different set of procedures when putting juveniles on trial. However, when facing the possibility of commitment to an institution, a juvenile offender must still be advised of the charges and of the right to counsel, the privilege against self-incrimination, and the right to confront prosecuting witnesses. As in the case of an adult charged with a crime, the guilt of a juvenile accused of committing an act of delinquency must be proven beyond a reasonable doubt.

Role-playing activities provide excellent means for learning about the United States justice system. Students will enjoy the drama of taking the part of a judge, lawyer, witness, or litigant. Criminal cases and situations pitting a person's individual rights against the authority of the government are particularly excellent situations for capturing and holding the attention of students.

Stephen S. Gottlieb is the CIJE Coordinator, ERIC Clearinghouse for Social Studies/Social Science Education at Indiana University.

Constitutional Rights at School. Students do not set aside their constitutional rights when they walk into school. However, those rights are balanced against school administrators' disciplinary authority and the civic responsibilities of students. Children facing suspension from school must be given hearings, but those hearings need not amount to formal trials. A student can wear an armband to school as an expression of his political views, but may be disciplined for a sexually suggestive speech delivered at a school-sponsored assembly. A student contributor to the school newspaper enjoys First Amendment rights, but the school that sponsors the paper can remove material that it views as inconsistent with the school's educational mission. School boards may order the removal of books from school libraries, but are prevented from taking the action if it is for partisan political reasons.

The rules regarding search and seizure also apply differently to schoolchildren. School officials are free to search a student if there is evidence that the student committed a crime or violated a school rule, and if the search is reasonable at the outset and reasonably limited in scope.

One of the most significant United States Supreme Court decisions in history dealt with the issue of race in public education. Prior to the 1950s, African Americans were still barred from attending many public schools solely on racial grounds. Longstanding court decisions held that "separate but equal" educational facilities for blacks were acceptable. In 1954, in the landmark decision of *Brown* v. *Board of Education of Topeka*, the United States Supreme Court finally held that the "separate but equal" policy was inherently unequal. In a follow-up ruling the next year, the justices ordered that schools were to be desegregated "with all deliberate speed." Notwithstanding the ruling, school desegregation suits continue to crop up from time to time.

The cases and situations discussed comprise just a small part of the United States' rich legal history. Knowledge of that history is of the utmost importance to those who are about to become adult participants in American society.

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APPENDIX IV

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Teaching about the Fourth Amendment's Protection Against Unreasonable Searches and Seizures

by Robert S. Leming

The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." With the passage of the U.S. Bill of Rights in 1791, (Amendments I-X of the U.S. Constitution), Americans acquired protection against unreasonable searches and seizures by the federal government. The understanding and interpretation of ideas expressed in the Fourth Amendment have been influenced by historical events, technological inventions, and changes in thinking about the meaning of the provisions in the amendment.

Understanding and Interpreting Searches and Seizures. What is a search? What is a seizure?

What constitutes a search was clearly outlined in one of the earliest Fourth Amendment cases. Decided in 1886, *Boyd* v. *United States* involved a federal customs statute that required businessmen (involved in importing goods) to choose between producing invoices and record books during a government inspection or having the imported goods confiscated by customs officials. Justice Joseph P. Bradley, delivering the opinion of the Court, struck down the customs statute and, in doing so, widened the scope of the Fourth Amendment. He argued, "It is not the breaking of a man's doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense."

Justice Bradley's interpretation of the Fourth Amendment was reshaped by three technological developments that occurred during the later part of the 19th century. The telephone, the microphone, and instantaneous photography all created new ways to conduct searches and seizures. In light of these new inventions, the questions for the Court became whether or not the use of these devices constituted a search and, if they did, were the searches reasonable.

In the 1928 landmark case of *Olmstead* v. *United States*, the Court was given the opportunity to decide the constitutionality of wiretapping by the FBI. In a split decision, the Court ruled that a wiretap was not a search and seizure within the meaning of the Fourth Amendment, therefore, the FBI's actions were constitutional.

The *Olmstead* decision helped define the meaning and scope of the Fourth Amendment for the next forty years. However, in 1967 the Court decided *Katz* v. *United States*, in which it reversed the *Olmstead* decision. Katz had been convicted of illegal gambling based on evidence gathered using a wiretap placed in a public telephone booth. Conversations between Katz and his gambling associates were overheard and recorded by the FBI. Justice Stewart, writing for the majority, stated, "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." In *Katz*, the Court defined a "search" as any governmental intrusion into something in which a person has a reasonable expectation of privacy and "seizure" as taking into possession, custody, or control.

The Meaning of "Unreasonable" in the Fourth Amendment. The question of what is "unreasonable" was first dealt with at the federal level in the 1914 case of *Weeks* v. *United States* and nearly fifty years later at the state level in the 1961 case of *Mapp* v. *Ohio*. In *Weeks*, the Court argued that evidence gathered in an illegal manner, without probable cause or without a search warrant, should be excluded from court proceedings. In part, the exclusionary rule was adopted to prevent abuses by the police and other government officials. The logic followed that if police understand that evidence seized in a manner that violates any of the provisions of the Fourth Amendment will be excluded from court proceedings, they will less likely conduct searches without warrants or without probable cause. The *Weeks* decision only affected federal courts, and two-thirds of the state courts rejected the exclusionary rule, claiming the rule placed unnecessary burdens on the police and the rule favored the guilty.

In the 1961 case of *Mapp* v. *Ohio*, the U.S. Supreme Court expanded the rights of the accused by applying the exclusionary rule to all criminal trials, both federal and state. Ms. Mapp had been sentenced to a year in jail for possessing pornographic materials seized in a search of her apartment. The police entered her apartment without a valid warrant, searching for a fugitive from justice and illegal gambling slips. The state attorneys argued that no matter how incorrectly the police behaved, their actions did not change the facts in the case. Ms. Mapp was guilty of possessing pornographic materials, therefore, her conviction should stand. The state also argued that the U.S. Supreme Court should allow local government to handle police excesses in their own way.

The U.S. Supreme Court disagreed with the state of Ohio and would not tolerate such an abuse of power exhibited by the Cleveland police. The Court's decision ensured that all citizens were afforded Fourth Amendment protection against "unreason-

Robert S. Leming is Director of the Indiana Program for Law-Related Education of the Social Studies Development Center, Indiana University.

able searches and seizures" by all levels of governmental officials.

During the past thirty years, many exceptions to the provisions outlined in the Fourth Amendment have been approved by the U.S. Supreme Court. In many situations, warrantless searches have been upheld by the Court. In addition, a number of exceptions to the exclusionary rule have also been approved. The constant changes in our thinking about and interpretation of the meaning of the Fourth Amendment illustrates the continuous evolving struggle of a citizenry trying to balance the democratic principles of securing and protecting individual rights with the promoting of public order and the common welfare.

Methods for Teaching the Fourth Amendment. An effective method of teaching Fourth Amendment ideas and issues is to use case studies, such as the *Katz* and *Mapp* cases. The case study method is effective because students learn to analyze a legal case by participating in class discussions, taking sides, stating points of view, and formulating and evaluating decisions. The case study method includes the following steps:

- Review the facts in the case.
- Determine the main constitutional issue in the case.
- Examine alternative arguments on each side of the issue in the case.
- Consider the decision (both the majority opinion and dissenting opinions, if any) and legal reasoning in the case.
- Assess the implications and the significance of the case in constitutional history.

Information for creating Fourth Amendment case study lessons can be derived from the official record of U.S. Supreme Court decisions, *United States Reports*. Standard reference books are useful sources of information on important Supreme Court cases. For example, a reliable source is *The Oxford Companion to the Supreme Court of the United States*.

In addition to the case study method, a moot court is an effective strategy that involves students participating as petitioners, respondents, and justices in a U.S. Supreme Court simulation. Students acting as attorneys prepare written arguments and present three-to-five-minute statements to panels of students participating as justices. The justices are responsible for rendering a decision and writing brief majority or minority opinions. In addition to helping students understand the facts, arguments, constitutional issues, and the decision in a case, a moot court helps students understand the process involved in obtaining justice.

Another effective teaching method is a simulated congressional hearing. The best example of this strategy in practice is "We the People. . . the Citizen and the Constitution." This national program is coordinated by the Center for Civic Education and is funded through the U.S. Department of Education. Students involved in the congressional hearings compete at the congressional district, state, and national levels. Entire classes, broken into six groups, prepare for hearings by studying the historical roots and modern day applications of democratic principles that are included in the Constitution and Bill of Rights. The hearings require students to formulate written statements presented orally to a panel of judges and to answer probing questions that require students to formulate verbal responses based on their understanding of the issues and their ability to apply democratic principles to modern-day examples. A simulated congressional hearing could be designed to test students' understanding of Fourth Amendment issues.

A final teaching method that involves students in learning constitutional principles is the use of Constitution-based scripted trials. A scripted trial involves students in the trial process through their participation as a judge, a bailiff, attorneys, witnesses, and jurors. Because the trial is scripted, key issues and information about the central issues of the case are introduced to the participants through the testimony of witnesses and the questions posed by the attorneys. After hearing and evaluating the evidence presented during the trial, students are asked to interpret the law and make decisions that affect the innocence or guilt of the defendant. Students are also encouraged to apply what they have learned through their participation in the scripted trial to new situations. An example of a Constitution-based scripted trial is *Indiana* v. *Jamie L. Curtis*, 1992. This scripted trial, published by the Social Studies Development Center and the Indiana State Bar Association, asks students to consider the reasonableness of a search of a student's book-bag.

The participants learn to apply a two-pronged test devised by the U.S. Supreme Court in the 1985 *New Jersey* v. *T.L.O.* case. The test suggests that both the inception and the scope of the search must be based on a reasonable suspicion.

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APPENDIX V

ABA's National Law-Related Education Resource Center: An Adjunct ERIC Clearinghouse for Law-Related Education

The National Law-Related Education Resource Center (NLRC) has broadened its scope by becoming the newest addition to the Educational Resources Information Center (ERIC) system. As the Adjunct Clearinghouse for Law-Related Education, in cooperation with the ERIC Clearinghouse for Social Studies/Social Science Education (ERIC/ChESS), NLRC will now make its resources available to a wider audience than ever before.

What is the National Law-Related Resource Center?

The American Bar Association's Public Education Division created the NLRC in 1991 to collect and disseminate information on law-related education (LRE) programs and resources, substantive legal topics, funding sources, and teacher and resource leader training opportunities. Today, the NLRC serves K-12 schools, college and university students, as well as the general public. NLRC also produces newsletters, technical assistance papers, anthologies, bibliographies, and books on LRE resources, such as *319 Current Videos and Software for K-12 Law-Related Education*.

What is ERIC?

ERIC is the world's largest and most widely used educational database. It is organized into several clearinghouses that acquire current educational materials in their subject fields. Offering services worldwide, ERIC provides ready access to educational documents through its information storage and retrieval system. Among these materials are curriculum guides, teaching units, bibliographies, journal articles, and research reports. Document information is announced in *Resources in Education (RIE)*; journal articles are announced in *Current Index to Journals in Education (CIJE)*.

What is an Adjunct Clearinghouse?

The establishment of an adjunct ERIC clearinghouse allows for greater, more comprehensive coverage of a particular area of study within the scope of the larger clearinghouse. The Adjunct ERIC Clearinghouse for Law-Related Education expands the LRE content within the broader ERIC Clearinghouse for Social Studies/Social Science Education (ERIC/ChESS), which monitors trends and issues about the teaching and learning of many social studies topics, including LRE. Many of the resources included in the adjunct clearinghouse database are cross-referenced in ERIC. People accessing ERIC to search for law-related topics will now find a larger number of documents in the field and will be referred to even greater numbers of materials available through NLRC. As the Adjunct ERIC Clearinghouse for LRE, the NLRC broadens the scope of available resource information that cannot otherwise be accessed through the ERIC system, such as videotapes, curriculum kits, computer software, and conference agenda.

Who Can Get Services from the National Law-Related Education Resource Center?

The Resource Center is available to anyone by telephone, mail, or FAX. Among our target audiences are K-12 educators, attorneys, college-level faculty, and community organizations working to improve public understanding about the law. Contact: NLRC, ABA Division for Public Education, 541 N. Fairbanks Court, Chicago, IL 60611-3314; (312) 988-5735 or FAX:(312) 988-5032.

How Can I Submit Products for Inclusion in the National Law-Related Education Resource Center and the ERIC Database?

If you have LRE documents you would like to submit to the National Law-Related Education Resource Center and the ERIC database, send two copies, along with the completed Reproduction Release Form found on the following page, to Paula Nessel, ABA/PED, 541 N. Fairbanks Court, Chicago, IL 60611-3314. We are interested in LRE products such as: teaching/learning materials, curriculum guides and kits, videotapes, software, conference papers and agenda, and research reports. If you have any questions, call (312) 988-5735.

"If there in any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Justice Robert H. Jackson
West Virginia State Board of Education v. *Barnette*, 1943

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